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No. 91-1202

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In The

Supreme Court of the United States

October Term, 1991

ANN RICHARDS, Governor of Texas; SELDEN HALE III, MAMIE MOORE PROCTOR, HON. CLARENCE N. STEVENSON, ALLAN B. POLUNSKY, JAMES M. ELLER, F.L. STEPHENS, JERRY H. HODGE, JOSHUA W. ALLEN, SR., ELLEN J. HALBERT, Members, Texas Board of Criminal Justice; JAMES A. LYNAUGH, Executive Director, Texas Department of Criminal Justice,

Petitioners,

vs.

LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE J. PINA, II, PAT REED, WESLEY SELLERS, individually and on behalf of all others similarly situated,

Inmate Respondents,

-and-

JOHN LINDSAY, HARRIS COUNTY JUDGE; EL FRANCO LEE, JIM FONTENO, STEVE RADACK, JERRY EVERSOLE, Harris County Commissioners; JOHNNY KLEVENHAGEN, Harris County Sheriff,

County Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

COUNTY RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Harris County Judge Jon Lindsay, Harris County Commissioners El Franco Lee, Jim Fonteno, Steve Radack and Jerry Eversole ("County Respondents") do not concur with Petitioners' statement of "Questions Presented." County Respondents urge that the following constitutes an accurate presentation of the substantive questions presented by Petitioners in their Petition for Writ of Certiorari:

1. Whether a federal district court is authorized to fashion a remedy upon finding violations of constitutional rights?

2. Whether the Eleventh Amendment Shields state officials acting contrary to the United States Constitution from prospective injunctive relief ordered by a federal district court because of ancillary costs.

3. Whether a federal district court can rely on the pronouncement of state law by a state trial court to fashion a remedy.

4. Whether a federal district court abuses its discretion by refusing to abstain when state law is clear and important constitutional rights are at issue.

5. Whether the Supreme Court should grant certiorari on an issue that is not ripe and presently pending in the Fifth Circuit, whose decision may moot any questions now presented.

6. Whether the Supreme Court should grant certiorari on the issue of the constitutional capacity of a county jail facility when the party seeking the writ lacks standing to complaint. complain.

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LAWRENCE R. ALBERTI, JIMMY E. COLLINS, HENRY C. LANGER, JOSE J. PINA, II, PAT REED, WESLEY SELLERS, Individually and on behalf of all others similarly situated,

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COUNTY RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

County Respondents do not agree with Petitioners' summary of the opinions rendered below, which mischaracterizes two of the underlying district court and Fifth Circuit orders as orders granting Harris County "compensation."[1] In addition, Petitioners failed to include the state court opinions upon which the United States District Court for the Southern District of Texas partially based its prospective injunctive remedial relief, and upon which the Fifth Circuit affirmed that relief.[2] These opinions are included in Respondents' Appendices A-H.

TEXAS CONSTITUTIONAL AND STATUTORY PROVISIONS OMITTED BY PETITIONERS

County Respondents do not concur with Petitioners' list of constitutional and statutory provisions relating to this case. Petitioners have omitted numerous provisions which the state courts of Texas have construed in finding that Petitioners have a duty to accept convicted felons sentenced to imprisonment in

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1. Petitioners' Petition for Writ of Certiorari (hereinafter "Petition") at 1.

2. The lower courts' orders were also based upon Texas statutes which, *inter alia*, require that convicted felons shall be imprisoned in the state penitentiary. Tex. Penal Code Ann. § 12.31(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.32(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.33(a) (Vernon 1974); Tex. Penal Code Ann. § 12.34(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.42 (Vernon 1974 & Supp. 1992); Tex. Crim. Proc. Code Ann. art. 42.09 §§ 1-4 (Vernon Supp. 1992); Tex. Rev. Civ. Stat. Ann. art. 6166r (in effect from 1927 - August 31, 1989) (recodified at Tex. Gov't Code Ann. § 499.006 (Vernon 1990) and later recodified at Tex. Gov't Code Ann. § 500.006 (Vernon Supp. 1992)); Tex. Gov't Code § 493.001 (Vernon Supp. 1992) (formerly Tex. Rev. Civ. Stat. Ann. 4413(401) § 1.02(a)); Tex. Gov't Code Ann. § 494.001(a) (Vernon Supp. 1992) (formerly Gov't Code Ann. § 494.001(a) (Vernon 1990)); Tex. Gov't Code Ann. § 495.004 (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.004 (Vernon 1990)). These statutes are attached as County Respondents Appendix L.

the Texas Department of Criminal Justice-Institutional Division (hereinafter "TDCJ-ID"). County Respondents supplement Petitioners' list with the following state constitutional and statutory provisions: Tex. Const. art. VIII, § 1-a (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.31(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.32(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.33(a) (Vernon 1974); Tex. Penal Code Ann. § 12.34(a) (Vernon Supp. 1992); Tex. Penal Code Ann. § 12.42 (Vernon 1974 & Supp. 1992); Tex. Crim. Proc. Code Ann. art. 42.09 §§ 1-4 (Vernon Supp. 1992); Tex. Rev. Civ. Stat. Ann. art. 6166r (in effect from 1927-August 31, 1989) (recodified at Tex. Gov't Code Ann. § 499.006 (Vernon 1990) and later recodified at Tex. Gov't Code Ann. § 500.006 (Vernon Supp. 1992)); Tex. Gov't Code § 493.001 (Vernon Supp. 1992) (formerly Tex. Rev. Civ. Stat. Ann. 4413(401) § 1.02(a)); Tex. Gov't Code Ann. § 495.001(a) (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.001(a) (Vernon 1990)); Tex. Gov't Code Ann. § 495.004 (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.004 (Vernon 1990)). These provisions are reproduced in County Respondents' Appendix L.

STATEMENT OF THE CASE

County Respondents adopt the factual and procedural history set forth by the Fifth Circuit in its July 25, 1991 opinion, which is substantially accurate.[3] Petitioners' Petition is rife with misstatements of the facts and law relating to this case. Even after the Fifth Circuit's opinion memorialized several instances where Petitioners mischaracterized the holdings of the United States District Court for the Southern District of Texas in this case,[4]

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3. *See Alberti v. Harris County*, Petitioners' Appendix at A1-A15, A18-A19, A24-A25.

4. *See, e.g., Alberti v. Harris County*, Petitioners' Appendix at A34-A35 & n. 8.

Petitioners appear before this Court, mischaracterizing the nature of this suit, as well as the action taken by the district court and by the Fifth Circuit.

For example, the opening paragraph of Petitioners' "Statement of the Case" took three words used by the Fifth Circuit in its *Alberti* opinion out of context and thereby misstated the foundation of the Fifth Circuit's opinion. According to Petitioners' Petition:

> This controversy swirls around whether Texas prison officials and the Governor of Texas [hereinafter "Petitioners"] bore any liability, especially financial liability, for felons sentenced to the state prison system but confined and maintained in the Harris County jail. [Petitioners] do not dispute the Fifth Circuit's analysis that this is "*exclusively*" a state law issue and that it presented a "*hard question*" for the court.[5]

Contrary to Petitioners' representations, the Fifth Circuit did not find that Petitioners' liability "exclusively" presented a state law issue which in turn presented a "hard question" for the court. Drawing from the Fifth Circuit's decision in ***Bush v. Viterna***, Judge Higginbotham outlined the three-pronged analysis undertaken by the Fifth Circuit when enforcing constitutional standards under 42 U.S.C. § 1983:

> Whenever a plaintiff alleges a cause of action under § 1983, a federal court must ask three questions. First, is a federal secured right involved . . . . Second, was the alleged deprivation of the right

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5. Petitioners' Petition at 3 (emphasis in Petition), citing *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A18. *See also*, Petitioners' Petition at 4, 14, 17 & 18-19.

> accomplished by state action? . . . Finally, who is the state actor responsible for the violation? *Unlike the first two questions*, the third question turns *exclusively* on state law . . . . The hard question in this appeal is the third question, the issue of who is liable for the conditions in the county's jails.[6]

Petitioners' representations, in contrast, raise the *Pennhurst*[7] specter while ignoring the first two questions outlined by the Fifth Circuit, ignoring the Fifth Circuit's analysis of their liability for deprivations of Respondents' federal constitutional rights under *Stewart v. Winter, Benjamin v. Malcolm*, and *Tate v. Frey*,[8] and ignoring the Fifth Circuit's explicit rejection of their contention that their duties only arose pursuant to state law.[9]

Alberti is neither a suit seeking the recovery of monetary damages, a suit between different levels of state government,[10]

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6. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A-18 (emphasis added in part), citing *Bush v. Viterna*, 795 F.2d 1203, 1208 (5th Cir. 1986).

7. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 97 L. Ed. 2d 67 (1984).

8. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix A18-A26, A34-A35, citing, *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied sub nom, Cuomo v. Koehler*, 480 U.S. 910, 107 S. Ct. 1358, 94 L. Ed. 2d 528 (1987); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984). *Compare* Petitioners' Petition at 1-2.

9. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A34.

10. Petitioners' Petition at 15-17. On virtually every page of their Petition, Petitioners attempted to portray *Alberti* as a case between two governmental entities, rather than a case in which they were found liable for violations of

(Cont'd)

nor a suit based upon Petitioners' violations of state law.[11] Instead, this is a class action civil rights case filed in 1972 under 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments by pretrial and convicted misdemeanants and felons incarcerated in the Harris County jail facilities (hereinafter "Inmate Respondents"), contesting the conditions of their confinement.

In February, 1987, County Respondents filed a motion for Final Judgment in *Alberti,* urging that they were in compliance with the district court's remedial orders and that the conditions of confinement in the jail facilities were constitutional. After reviewing the facilities, court-appointed monitors determined that "as of June 1, 1987, the County's facilities were five percent over capacity."[12] Citing County Respondents' renovation of their 301 San Jacinto Jail facility, construction of a new 4,000-bed downtown jail, and design of a Criminal Justice Center, the *Alberti* monitors stated, "[u]nlike most jurisdictions around the country prodded to reform by judicial intervention, the defendants are not content to rest on their laurels until the next crisis emerges, but instead have moved aggressively and efficiently to anticipate

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(Cont'd)
Respondent's Eighth Amendment rights. The Fifth Circuit succinctly addressed this argument, stating: "The state also makes a general federalism argument, suggesting that '[a] federal court has no jurisdiction (no power) to act as arbiter between different levels of a State's government that are in dispute.' Again, this argument mischaracterizes the action; the state is responsible for a federal constitutional violation." *Alberti v. Sheriff of Harris County,* Petitioners' Appendix at A35 n. 8.

11. *See, e.g.,* Petitioners' Petition at 1, 3-6, 10, 11, 14 & 24. The sheer number of misstatements made in Petitioners' "Statement of the Case," as well as the balance of their Petition, has compelled County Respondents to address them in a separate section, under roman numeral "V."

12. *Alberti* Monitors' Oct. 7 1987 Findings & Recommendations at 28.

future needs."[13] According to the monitors, "[w]hile the task is not yet complete, the distance already covered [by County Respondents] is vast, and a finish line is discernable."[14]

Since September, 1987, however, Petitioners have refused to timely accept convicted felons ready for transfer (hereinafter "prison-ready felons") into the state prison system, thereby causing severe overcrowding in the Harris County Jail facilities. In 1989, Inmate Respondents and County Respondents joined Petitioners as Defendants and Third Party Defendants in their official capacities in the *Alberti* case, seeking to enjoin Petitioners to remove all prison-ready felons from the Harris County Jail facilities, and to continue thereafter to remove them. Neither Inmate Respondents nor County Respondents sought any monetary relief from Petitioners.[15] Petitioners' Petition does not even mention that Respondents sued them directly for constitutional violations.

After a bench trial in August, 1989, and hearings in September, 1989, the district court issued its September 25, 1989 Findings of Fact and Conclusions of Law, finding that Petitioners caused and were responsible for the overcrowding in the Harris County Jail facilities — the essential element in its finding that the jail facilities were unconstitutional. In particular, the district court held that "extreme overcrowding is the primary cause of the conditions of confinement listed below that inmates must endure at the Harris County Jail facilities," that Petitioners "caused the overcrowding crisis in the Harris County Jail facilities," that the jail "conditions are cruel and unusual in violation of Plaintiffs' Eighth and Fourteenth Amendment rights,"

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13. *Alberti* Monitors' Oct. 7, 1987 Findings & Recommendations at 80-81.

14. *Alberti* Monitors' Oct. 7, 1987 Findings & Recommendations at 92.

15. County Respondents' Appendix at I & J.

that Petitioners' refusal to accept convicted felons ready for transfer to TDC has caused those inmates to suffer cruel and unusual punishment in the Harris County Jail facilities," and that Petitioners' "refusal to accept all convicted felons ready for transfer from the jail prevented respondents from fully complying with this Court's orders."[16]

Thereafter, the district court issued the injunctive remedial orders at issue here, requiring both County Respondents and Petitioners to limit the numbers of county and state prisoners in the Harris County Jail facilities.[17] The details of any necessary reductions in prisoner populations made by County Respondents and Petitioners pursuant to the order were left to the defendants' discretion. On the contrary, the order set caps on both the "county" and "state" prisoner populations in the jail, ordered the transfers of prison ready felons to other county jail facilities if either population exceeded the cap, and imposed liability for the ancillary costs of those transfers upon the party (either State or County) exceeding its cap.[18] The remedial orders thus gave Petitioners a choice of limiting the prison-ready population within the Harris County Jail facilities to 1,575 prison-ready felons, taking any steps consistent with state law or federal court orders to reduce the prison-ready felon population, or paying the ancillary costs of housing prison-ready felons above their cap in other Texas county detention facilities.[19] Recognizing that County Respondents

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16. Petitioners' Appendix at X4, X17, X22.

17. When citing the district court's February 7, 1991 injunctive remedial order, Petitioners wrongly inferred that they alone bore the burden of any transfers of prison-ready felons to other county jail facilities. Petitioners' Petition at 5.

18. Petitioners' Appendix at R6-R7.

19. Petitioners' Appendix at R6-R8.

and Petitioners, as well as many other Texas counties, were litigating the duty and reimbursement issues in state court, the district court noted that its costs assessment was tentative and preliminary and would be finalized contingent on the outcome of pending litigation.[20]

In *Nueces County v. Texas Board of Corrections* and *Harris County v. Texas,* Judge Joseph Hart rejected each of the arguments Petitioners make in their Petition, and held that Petitioners had a duty to accept prison-ready felons under state law or pay for their upkeep in the county jails.[21] Given Petitioners' failure to timely take their prison-ready felons, the state district courts ordered them to take their prisoners or to reimburse the counties for housing prison-ready felons. After final judgment had been entered in these state lawsuits, the Petitioners settled

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20. Petitioners' Appendix at R7.

21. *See* orders entered in Civil Action No. 452,071; *County of Nueces, Texas, et al. v. Texas Board of Corrections* (250th Judicial District Court of Travis County, Tex.); Civil Action No. 475,468; *Harris County, Texas, et al. v. State of Texas* (126th Judicial District Travis County, Tex.), at County Respondents' Appendix A-H. *See also, Tarrant County Commissioners Court v. Markham,* 779 S. W. 2d 872, 874-75 (Tex. App.-Fort Worth, writ denied 1989) (wherein Texas' Second Court of Appeals observed that "[t]he sad truth is that the State of Texas fails to meet its obligations to incarcerate convicted felons because of the state's settlement agreement in the well known *Ruiz* case . . . the unhappy result is that there are two prison systems in Texas. One is operated 'on the books' by T.D.C. and appears to meet the state's obligations under *Ruiz.* This prison system is financed by the State of Texas out of the state budget. The second prison system is less visible to the public eye; but it exists in increasingly overcrowded county jails. In this system, inmates who have been committed to T.D.C. by state courts are forced to languish in jails of the various counties throughout the state, because of state's failure to accept the inmates committed to T.D.C. . . . These county jails were not designed to house convicted felons who have been committed to T.D.C. for relatively long periods of time.").

their lawsuits with the various counties, thereby precluding state appellate review of those judgments. In House Bill 93, the State Legislature essentially codified the state court reinbursement holdings and adopted the *Alberti* district court's transfer remedy. Pursuant to this statute, Petitioners are required to reimburse counties for the costs of housing the state's prison-ready felons left in the counties' jails and must pay for transfers of prison-ready felons to other county jail facilities given overcrowded conditions.[22]

On July 25, 1991, the Fifth Circuit rendered its opinion in four consolidated appeals.[23] In this opinion, the Fifth Circuit held, *inter alia*, that Petitioners could not disclaim responsibility for violations of prisoners' Eighth Amendment rights in the Harris County Jail facilities under all arguments advanced by Petitioners.[24]

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22. Tex. Gov. Code §§ 499.123 & 499.125 (Vernon Supp. 1992).

23. *Alberti v. Sheriff of Harris County*, 937 F.2d 984 (5th Cir. 1991) (Petitioners' Appendix at A). The consolidated appeals related to County Respondents' and Petitioners' appeals of the district court's September 25, 1989 Findings of Fact and Conclusions of Law (Petitioners' Appendix at X); Respondents' appeal of the district court's October 23, 1989 order denying their motion to amend or supplement the September 25, 1989 Findings and Conclusions or for a New Trial (Petitioners' Appendix at W); County Respondents' and Petitioners' appeals of the district court's April 5, 1990, September 7, 1990, February 7, 1991 and March 15, 1991 injunctive remedial orders (Petitioners' Appendix at P, R, U & V); County Respondents' appeals of the *Ruiz* Court's February 7, 1991 and March 15, 1991 advisory opinions (Petitioners' Appendix at Q & S), Petitioners' appeal of the district court's April 22, 1991 and November 19, 1990 remedial orders (Petitioners' Appendix at O & T) and Petitioners' Petition for Writ of Mandamus, Motion to Stay the district court's May 28, 1991 Order and Motion to Stay and/or Petition for Writ of Prohibition, filed in the Fifth Circuit on or about March 5, 1991, June 5, 1991 and July 25, 1991. The orders found at Petitioners' Appendix at D-N were not part of the consolidated appeal decided on July 25, 1991.

24. *See generally, Alberti v. Harris County*, Petitioners' Appendix A.

On October 22, 1991, the Fifth Circuit denied Petitioners' Petition for Panel Rehearing, finding that neither House Bill 93 nor the settlement of *Harris County v. State of Texas* changed the legal relationship between the state and counties in such a manner as to require it to reconsider its earlier opinion or the district court's reimbursements made to Harris County.[25]

SUMMARY OF THE ARGUMENT

This case should not be reviewed on certiorari because the Fifth Circuit's opinion raises no issues of national importance, because there are no conflicting circuit court opinions commanding reconciliation by this Court, and because Petitioners have failed to present their petition for certiorari with accuracy in violation of Rule 14.5. Petitioners merely seek this Court to serve as a "super-appellate" court, reviewing well-settled legal principles and factual findings which have been decided adversely to them.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S *ALBERTI* OPINION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS DECIDING THESE SAME OR SIMILAR MATTERS.

Petitioners' *Pennhurst* and Eleventh Amendment arguments are neither novel nor substantial, and have been squarely addressed previously by this Court. It is well-settled that federal district courts have broad discretion in imposing injunctive remedial relief with attendant ancillary costs against state officials when

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25. *See generally,* Petitioners' Appendix B.

vindicating constitutional rights.[26] Upon finding that Petitioners violated Respondents' Eighth Amendment rights, the district court was not only authorized, but was mandated, to fashion a remedial order to adjudicate the wrong.[27]

Petitioners argue that certiorari should be granted because *Alberti* conflicts with the Sixth Circuit's opinion in *Kelley v. Metropolitan County Board of Education*.[28] No such conflict exists. *Kelley* is patently inapplicable to the factual and legal issues raised in *Alberti*.

In *Kelley*, the Metropolitan County Board of Education sued state officials seeking recovery of costs previously incurred in a school desegregation case where the relief sought by the Plaintiffs — desegregation — had been fully implemented. In *Kelley*, unlike *Alberti*, the Sixth Circuit observed, "[t]he Tennessee officials are not doing anything wrong; they have been joined solely to permit one sometime constitutional wrongdoer to recover monetary compensation from another."[29] In *Alberti*, however, the

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26. *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977); *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. 1347, 1358, 39 L. Ed. 2d 662 (1974); *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 2d 714 (1908).

27. In *Ruiz v. Estelle*, the same Petitioners in charge of the State's prison system argued that they were entitled to Eleventh Amendment immunity from suit. The Fifth Circuit rejected the State's Eleventh Amendment immunity claims, holding that the "Board members are responsible as individuals, in the same manner as the Director of TDC, for any violation of constitutional rights caused by their management." *Ruiz v. Estelle*, 679 F.2d 1115, 1137 (5th Cir.), *modified in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1438, 75 L. Ed. 2d 795 (1983).

28. *Kelley v. Metropolitan County Board of Education*, 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988).

29. *Kelley*, 836 F.2d at 990.

Inmate Respondents and County Respondents have not sought the imposition of any monetary damages against the Petitioners, nor have such damages been assessed.[30]

In *Kelley*, unlike *Alberti*, the Sixth Circuit found that the record "simply did not show that the State of Tennessee is currently a participant in any constitutional violation."[31] In *Alberti*, in contrast, the district court held that Petitioners were directly causing continuing deprivations of Respondents' Eighth Amendment rights. Petitioners' *Kelley* argument also ignores the fact that the district court found that they caused the unconstitutionally overcrowded conditions in the Harris County Jail facilities, ignores the fact that the prison-ready felon population continued to grow, making it virtually impossible for the County Respondents to remedy the overcrowding in these facilities and hence provide constitutional conditions of confinement to all inmates, and ignores the fact that the district court gave Petitioners the choice of limiting the prison-ready population in the jail facilities or expending the ancillary costs associated with transferring those in excess of their cap to other county detention facilities.[32]

Upon review of these arguments, Judge Higginbotham observed:

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30. County Respondents' Appendix at I & J.

31. *Kelley*, 836 F.2d at 995. According to the Sixth Circuit, "[W]e have searched the record of this case in vain for any demonstration that the integration of metropolitan Nashville's schools has been wrongfully impeded by anything the state has done, or has failed to do, in the 1970s or 1980s. The mere fact that Tennessee was a constitutional wrongdoer prior to 1956 does not mean that it was still a constitutional wrongdoer when the district court entered its order 30 years later." *Kelley*, 836 F.2d at 993-94.

32. *See* Petitioners' Appendix S & X.

> The state also urges that the orders violate the Eleventh Amendment because they exact monetary rather than prospective relief. Like the *Pennhurst* argument, however, this contention mischaracterizes the orders — the plaintiffs established a federal constitutional violation, and the state is a responsible party. The required payments are thus 'a necessary consequence of compliance in the future with a substantive federal question determination.' . . . *Kelley*, cited extensively by the state, is distinguishable — the order remedying the violation in *Kelley* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order.[33]

Indeed, the Fifth Circuit's *Alberti* opinion follows three cases "involv[ing] essentially identical situations" as presented in *Alberti*, including the Sixth Circuit's *Tate v. Frey* decision, the Second Circuit's *Benjamin v. Malcolm* decision (wherein certiorari was denied), and the Fifth Circuit's *Stewart v. Winter* decision.[34] There

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33. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A34-A35, citing *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. 1347, 1358 39 L. Ed. 2d 662 (1974); *see also, Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977); *Williams v. Edwards*, 547 F.2d 1206, 1212-13 (5th Cir. 1977); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), *rev'd in part on other grounds*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and citing *Kelley*, 836 F.2d at 990-94.

34. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix at A19-A22, A34-A35, citing *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982); *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied sub nom, Cuomo v. Koehler*, 480 U.S. 910, 107 S. Ct. 1358, 94 L. Ed. 2d 528 (1987); *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984) (per curiam).

is, therefore, no conflict between the Fifth and Sixth Circuits, or any other circuit.

II.

THE FIFTH CIRCUIT'S ABSTENTION AND CERTIFICATION HOLDINGS DO NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In the Fifth Circuit, Petitioners argued that the district court should have abstained from ordering it to pay for the housing of prison-ready felons transferred to other Texas county jail facilities pending the ultimate resolution of the state litigation.[35] Both state cases have been resolved. In each case, the state district court found that Petitioners have a clear, mandatory, non-discretionary duty to take and make provision for prison-ready felons within a reasonable time after they are sentenced to the state penitentiary or to pay for their upkeep in Texas county jail facilities.[36] Thereafter, the parties settled the litigation. Given the resolution of these cases, Petitioners' argument is now moot.

Notwithstanding the mootness of Petitioners' argument, Petitioners' abstention and certification arguments wrongly

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35. *See Alberti v. Sheriff of Harris County,* Petitioners' Appendix at A35.

36. *See* County Respondents' Appendix at A-H. Petitioners argue that since they settled these cases before a state appellate court reviewed these decisions, the state court pronouncement should be given no weight in the federal proceedings. However, this Court has recognized that trial court interpretations constitute a ruling on a question of state law which is binding on the federal courts. *See City of Houston v. Hill,* 482 U.S. 451, 107 S. Ct. 2502, 2514, 96 L. Ed. 2d 398 (1987). Therefore, there was no necessity to abstain until a state appellate court had had an opportunity to rule. *Id.*

attempt to elevate matters of discretion to mandatory requirements. The Fifth Circuit's *Alberti* opinion presents no departure from settled principles which grant discretion to the lower courts in deciding whether to postpone or decline jurisdiction under the abstention doctrine.[37] This Court has admonished that abstention should only be used in extraordinary and narrow circumstances where it would clearly serve an important countervailing interest.[38] Abstention is the exception, not the rule.[39] After determining that none of the abstention theories fit the facts of *Alberti,* the Fifth Circuit found that the district court "simply adopted the approach of the only state court to have decided the issue pending a decision by a higher state court.[40]

"Federal abstention . . . presupposes the availability of an

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37. *Harman v. Forssenius,* 380 U.S. 528, 85 S. Ct. 1177, 1181, 14 L. Ed. 2d 50 (1965). "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction . . . . Thus, 'recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.' " *Harman,* 85 S. Ct. at 1182 (citations omitted).

38. *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 79 S. Ct. 1060, 1063 (1959).

39. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S. Ct. 1236, 1244, 47 L. Ed. 2d 483 (1976).

40. *Albert v. Sheriff of Harris County,* Petitioners' Appendix at A35-A36. While an appeal with a supersedeas stays the execution of the judgment, it does not, until and unless reversed, detract from its decisiveness and finality. *See e.g., Huron Holding Corp. v. Lincoln Mine Operating Co.,* 312 U.S. 183 (1941); *Fidelity St. Life Ins. Co. v. First Nat. Bank & Trust,* 510 F.2d 272, 273 (5th Cir. 1975), *cert. denied,* 423 U.S. 864 (1975).

alternative state forum which can afford full and fair relief."[41] Where certain types of relief are not available in state court, or where delay might significantly impair constitutional rights, abstention is inappropriate.[42] Petitioners erroneously characterize this case as simply a dispute between County Respondents and Petitioners.[43] On the contrary, the dispute resolved by the lower courts' orders is between the Inmate Respondents and Petitioners and is based upon federal constitutional law. In the present case abstention would have vitiated Inmate Respondents' federal constitutional claims against Petitioners. Furthermore, abstention would have prevented an adjudication of Petitioners' liability, leaving County Respondents strictly liable for Petitioners' breach of their federal constitutional duties. To impose a remedy against one defendant without ascertaining the respective liabilities of all defendants would have been contrary to established principles of jurisprudence and would have contravened fundamental concepts of due process, fairness and justice.

Petitioners urge that the district court's injunctive remedial orders "undermined" House Bill 2335's allocation formula by "de facto giving Harris County additional beds above its allocation formula."[44] Petitioners fail to mention, however, that the allocation formula specifically provided for the dedication of additional beds to counties with overcrowded jails. Petitioners also contend that the orders removed Harris County's financial

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41. *Nissan Motor Corp. v. Harding*, 739 F.2d 1005, 1010 (5th Cir. 1984), quoting *Duncan v. Poythress*, 657 F.2d 691, 696 n. 5 (5th Cir. 1981), *cert. dism'd*, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

42. *Nissan Motor Corp.*, 739 F.2d at 1010-11 (citations omitted).

43. *E.g.*, Petitioners' Petition at 19-20.

44. Petitioners' Petition at 21.

burden of supporting inmates sentenced to state prison in excess of Harris County's allocation.[45] In *Harris County v. State of Texas,* the state district court not only found that House Bill 2335 and its allocation formula in no way relieved or excused Petitioners' financial liability for prison-ready felons, but also held that Petitioners unconstitutionally used *ad valorem* tax money collected by Harris County.[46] Even assuming *arguendo,* if there were a complex state regulatory scheme for sentencing and housing convicted felons, *Burford* would not require abstention.[47] No doctrine requires abstention merely because resolution of a federal question may result in the overturning of a state policy.[48]

Petitioners also argue that the Fifth Circuit abused its discretion in not attempting to certify the state law questions to the Texas Supreme Court. Certification is not mandated but is discretionary and provides no basis for this Court's review.

III.

THE *WILSON V. SEITER* ISSUE

This Court should deny Petitioners' application for certiorari on the *Wilson v. Seiter* issue because their contentions are presently pending before the Fifth Circuit, because Petitioners essentially ask this Court to serve as a fact-finder and because Petitioners' Petition misstates the record and holdings relating to this issue.

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45. Petitioners' Petition at 21-22.

46. *See, e.g.,* County Respondent's Appendix G at page 53a.

47. *New Orleans Public Service v. Council of New Orleans,* 109 S. Ct. 2506, 2514 (1989), citing *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S. Ct. 1098 (1943).

48. *Zablocki v. Redhail,* 434 U.S. 374, 98 S. Ct. 673, 678 n. 5 (1978).

Petitioners' *Wilson v. Seiter* contentions are not ripe for this Court's determination of certworthiness because they are presently pending before the Fifth Circuit after remand.[49] The Fifth Circuit's July 25, 1991 opinion remanded *Alberti* to the district court for its entry of findings regarding the "deliberate indifference" issue in light of *Wilson v. Seiter*.[50] On August 7, 1991, the *Alberti* court found that the Petitioners were deliberately indifferent.[51] Petitioners' appeal from this finding is presently pending before the Fifth Circuit. This finding is not of "such imperative public importance to justify deviation from normal appellate practice and to require settlement in this Court."[52]

Furthermore, Petitioners are essentially asking this Court to decide factual issues, as evidenced by their extensive citation to the *Alberti* court transcripts on pages 25 and 26 of their petition for writ of certiorari. Petitioners are requesting that this Court decide issues of fact concerning the reasonableness of the use of state mechanisms, such as the Prison Management Act. This Court would have to decide these factual issues before it could reach the legal issues implicated in *Alberti*. This Court is a "court of law . . . rather than a court for correction of errors in fact finding, [and] cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."[53]

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49. *Wilson v. Seiter*, 111 S. Ct. 2321 (1991).

50. *Alberti v. Sheriff of Harris County*, Petitioners' Appendix A40.

51. *See* Petitioners' Appendix J.

52. *See* S. Ct. R. 11.

53. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 69 S. Ct. 535, 538, 93 L. Ed. 2d 672 (1949).

Finally, Petitioners' *Wilson v. Seiter* argument should be summarily denied because their argument misrepresents the *Alberti* record and misstates the Fifth Circuit's holdings. Petitioners boldly claim that nothing in the *Alberti* record suggests that they knew about the conditions in the Harris County Jail facilities prior to September, 1989.[54] Without even attempting a foray into the *Alberti* testimony and exhibits, the *Alberti* pleadings themselves reveal that Petitioners knew about the conditions in the Harris County jail facilities in October, 1988, when the Harris County Sheriff sent letters to Petitioner James Lynaugh, pleading for removal from the jail of the State's convicted felons. The district court's November 8, 1988 order directing the Sheriff to transfer prison-ready felons to the State's prison, County Respondents' December 12, 1989 motion to join Petitioners as Third Party Defendants, County Respondents' January 13, 1989 third party complaint and every one of the scores of *Alberti* pleadings filed before September, 1989, as well as the August, 1989 trial, gave Petitioners ample notice of the conditions of confinement in the Harris County Jail facilities.

Petitioners did not accurately restate the Fifth Circuit's discussion of the various methods by which they could have satisfied their duties to the Inmate Respondents.[55] Contrary to the two-item list given by Petitioners, the Fifth Circuit enumerated several "common sense solutions" and directed Petitioners to other solutions specified in a district court order.[56]

Petitioners argue that this Court must affirm a cost defense under *Wilson v. Seiter* because the Texas Legislature "resolved

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54. Petitioners' Petition at 23-24.

55. Petitioners' Petition at 24.

56. *Alberti v. Sheriff of Harris County*, Petitioner' Appendix at A30-31.

to build a set number of beds and allocate that capacity."[57] Petitioners neglect to acknowledge that they made no efforts to seek additional funding from the state legislature when confronted with the overcrowding problem.[58] Accordingly, they failed to make any showing that a "recalcitrant legislature was the culprit."[59]

Petitioners assert that *Ruiz* court orders prohibited their use of temporary housing "such as tent cities," and claim that "efforts to modify those orders have proved unsuccessful."[60] Petitioners failed to note that they have disregarded open invitations from the Fifth Circuit to seek modification of their *Ruiz* cap, and that their previous efforts to modify that cap included only one attempt in 1986, a year after they signed their overcrowding stipulation agreement in *Ruiz*.[61] These and other misstatements and inaccuracies require summary denial of Petitioners' Petition.

IV.

CONSTITUTIONAL CAPACITY

Petitioners have no standing to complain about the constitutional capacity limitations placed on the Harris County Jail facilities. No pending *Alberti* order imposes injunctive relief against Petitioners in conjunction with the district court's determination of the constitutional capacity of the jail facilities.

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57. Petitioners' Petition at 25.

58. Oct. 20, 1990 Tr. Vol. 1 at 66, ll. 18-25.

59. *Alberti v. Harris County,* Petitioners' Appendix at A31.

60. Petitioners' Petition at 25.

61. *See* County Respondents' Appendix at K; *Ruiz v. Lynaugh,* 811 F.2d 856 (5th Cir. 1987).

Furthermore, after only a passing reference to this issue in their Fifth Circuit brief, Petitioners did not fully brief this issue. They cannot, therefore, raise this issue before this Court.

V.

PETITIONERS' FAILURE TO ACCURATELY PRESENT THE LOWER COURTS' FACTUAL FINDINGS AND LEGAL HOLDINGS

"The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the Petition."[62] County Respondents are constrained to catalog the most blatant misstatements made by Petitioners made in violation of this Court's rules.

Petitioners state that the Texas Legislature, on "three occasions, failed to pass bills to compensate Texas counties for holding convicted felons."[63] They failed to note, however, that these bills never made it to the floor of the Legislature.[64] Petitioners urge that "state law is explicit and abundantly clear that the state prison system has a duty to accept inmates 'only' pursuant to former TEX. REV. CIV. STAT. ANN. art. 6166a-4 . . ."[65] The statute does not state this proposition, and the state court has ruled that Article 6166a-4, the allocation formula, does not change

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62. *See*, S. Ct. R. 14.5.

63. Petitioners' Petition at 6.

64. *Alberti v. Harris County*, Petitioner' Appendix at A27.

65. Petitioners' Petition at 7 (emphasis in Petition), citing Tex. Gov't Code § 499.071 (Vernon Supp. 1992).

Petitioners' duties owed to convicted felons.[66]

Petitioners maintain that House Bill 2335's "primary purpose was to establish a system of financial incentives and disincentives directed at controlling front-end population pressures by providing state financing for sentencing alternatives *while at the same time forcing local governments to fund the cost of their own transfer-eligible inmates.*"[67] Neither House Bill 2335, nor its legislative history, supports the highlighted portion of this proposition.[68]

In support of their arguments, Petitioners cite a Special Master's report which has not been adopted by the district court, and which is not properly part of the record in this Court.[69] Citing this report, Petitioners state that they have built or funded a grand total of 62,849 beds since 1984. They fail to add that the report references only the gross number of beds brought on line by Petitioners, while ignoring their own *Ruiz* depopulation agreements. They fail to acknowledge that they provided a net increase of only three prison beds in the state's penitentiary between 1982 and 1987, and a net increase of only 11,771 prison beds between 1982 and 1991.

Contrary to Petitioners' contentions, neither the legislative history of House Bill 93 nor the settlements of the state cases indicated that the State was liable for prisoner transfers only after October 1, 1991.[70]

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66. County Respondents' Appendix at A-H.

67. Petitioners' Petition at 8 (emphasis added).

68. *See* County Respondents' Appendix at A-H.

69. Petitioners' Petition at 8. Petitioners also cite a transcript of remarks which is not properly before this Court. *Id.* at 14.

70. *Compare,* Petitioners' Petition at 10.

These and the other examples of misstatements made by Petitioners included in this brief compel summary denial of Petitioners' Petition.

CONCLUSION

While every case involving the deprivation of constitutional rights is important, Petitioners have failed to establish any special and important reasons for this Court to grant certiorari in this case. County Respondents therefore ask this Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED NOVEMBER 26, 1990 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

IN THE DISTRICT COURT
TRAVIS COUNTY, TEXAS
250th JUDICIAL DISTRICT

NO. 452,071

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEFHENS; DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned cause came on for trial before the Court without a jury in several proceedings. Partial summary judgment was rendered in favor of Plaintiff/Relator and Intervenors (the Counties). Evidentiary hearings were held on October 2-5, 1989 on Defendants/Respondents' impossibility defense; on April 30-May 2, 1990 on what constitutes a reasonable amount of time after sentencing for the State to take its prisoners or to begin compensating the Counties and what constitutes reasonable compensation per prisoner day when the State does not take the prisoners; and on August 8, 1990 on whether the amount of time and compensation found to be reasonable prior to the adoption

of the allocation formula on March 2,1990 pursuant to House Bill 2335 was reasonable thereafter. All parties were present through their attorneys at all trial proceedings. After considering the pleadings, the evidence, the argument and briefs from counsel, the Court in response to a request from the State makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. This cause was commenced by Nueces County seeking a writ of mandamus to compel the Texas Board of Corrections; the members of the Texas Board of Corrections; and James A. Lynaugh, Executive Director of the Texas Department of Corrections, to take and to make provision for prisoners sentenced to confinement in the State penitentiary ("State prisoners") who were being held in the county jail (or in the jail of another entity under contract).

2. Seeking the same relief as Nueces County, the Counties of Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis and Victoria intervened (these counties together with Nueces County are referred to as "Counties").

3. The Counties demanded that Respondents carry out their duty to take prisoners within a reasonable time after sentencing to confinement in the State penitentiary and the Counties' demands were refused.

4. The Counties continue to hold state prisoners in their jails or in the jails of other entities under contract.

5. During the pendency of these proceedings, the Texas Board of Corrections and the Texas Department of Corrections were

replaced by successors.

6. The Texas Board of Criminal Justice is the successor to the Texas Board of Corrections and the Texas Department of Criminal Justice is the successor agency to the Texas Department of Corrections.

7. The State prison system is now operated by the Institutional Division of the Texas Department of Criminal Justice.

8. All the members of the former Board of Corrections were appointed to its successor, the Texas Board of Criminal Justice, and James A. Lynaugh was appointed by the new Board as Executive Director of the successor agency, the Texas Department of Criminal Justice.

9. The members of the Texas Board of Criminal Justice, the Executive Director of the Texas Department of Criminal Justice, and the Director of the Institutional Division of the Texas Department of Criminal Justice along with the respective Board, Department, and Division are Respondents in this action. (Respondents are hereafter jointly referred to as "TDC.")

10. Lack of joinder of all Texas counties and State prisoners in county jails does not impair or impede the ability of such parties to protect their interests.

11. The Crowding Stipulation in *Ruiz v. Lynaugh,* Civil Action No. H-78-987 (S.D. Tex.) (hereinafter "*Ruiz*") represents a settlement agreement entered by the State which, among other things, limits the State penitentiary inmate population.

12. It is not impossible for TDC to carry out its mandatory duty

to take State prisoners within a reasonable time after the prisoners are sentenced to serve a term in the State penitentiary.

13. A number of means of carrying out the mandatory duty to make provision for convicted felons are available to TDC including: a) contracting with private vendors, local governmental entities such as counties, or the federal government; b) use of the Prison Management Act, furloughs, and good conduct time to control prison population administratively; c) seeking reasonable modification of the crowding stipulation in *Ruiz* in good faith; and/or d) use of appropriated funds or seeking additional funds to perform this nondiscretionary obligation.

14. TDC has not compensated the Counties for holding State prisoners that TDC should have taken.

15. A demand by the Counties for payment of compensation from TDC for holding State prisoners would have been futile.

16. TDC was given opportunity to set an amount it deemed to be reasonable compensation to the Counties for carrying out the mandatory duty on which TDC had defaulted.

17. TDC refused to set an amount of reasonable compensation and requested a jury trial on this issue which was granted but was later withdrawn by TDC in favor of a trial before the Court without a jury.

18. TDC was given opportunity to set an amount of time that it considered to be a reasonable amount of time after sentencing for TDC to take its prisoners or to begin compensating the Counties that are providing for the prisoners because of the TDC's default.

Appendix A

19. TDC refused to set an amount of reasonable time and requested a jury trial on this issue which was granted but was later withdrawn by TDC in favor of a trial before the Court without a jury.

20. The reasonable value of the services provided by the Counties in holding State prisoners that TDC should have taken is $40.00 per prisoner per day.

21. An amount of compensation to the Counties of less than the reasonable value of services provided in holding State prisoners would be an incentive to TDC to continue to impose its mandatory duty by default on the Counties which are unwilling and unauthorized to accept that duty.

22. A reasonable amount of time after sentencing for TDC to either take the State prisoners or begin compensating the Counties who hold the prisoners because of the TDC's default is seven days.

23. TDC's failure and refusal to carry out their duty to take State prisoners caused a backlog of State prisoners in the Counties' jails or in facilities with which the Counties contracted and made it futile for the Counties to timely prepare transfer paperwork and present prisoners to TDC for admission to the State penitentiary.

24. From September 28, 1987 through March 1, 1990, TDC's Scheduled Admissions Policy allocated to the Counties a portion of the total capacity available in TDC's prison facilities.

25. Effective March 2, 1990, the allocation formula adopted by TDC pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990) allocates to the Counties a portion of the total capacity available in TDC's prison facilities.

Appendix A

26. The number of prisoner days for which TDC is required to compensate the Counties for the period from September 28, 1987 through February 28, 1990 is as follows:

Bexar	403,750
Collin	77,318
Dallas	848,740
El Paso	220,367
Galveston	86,038
Hidalgo	63,013
Hunt	20,717
Lubbock	92,198
Nueces	143,266
Tarrant	377,021
Travis	170,987
Victoria	4,621

27. The aggregate amount of compensation owed by TDC to the Counties for the period from September 28, 1987 through February 28, 1990 is as follows:

Bexar	$16,150,000

Appendix A

Collin	3,092,720
Dallas	23,949,600
El Paso	8,814,680
Galveston	3,441,520
Hidalgo	2,520,520
Hunt	828,680
Lubbock	3,687,920
Nueces	5,730,640
Tarrant	15,080,840
Travis	6,839,480
Victoria	184,840

28. The number of prisoner days and amounts of compensation listed in these findings do not include any prisoners (a) returned to county jail on bench warrants awaiting further proceedings, (b) awaiting trial in state court on the remainder of multiple charges, (c) placed in county jail pursuant to blue warrants prior to parole revocation proceedings, (d) being held on federal detainers awaiting trial in federal court, and (e) pending appeal of sentences of ten years or less who have not exercised their right to be transferred to the State penitentiary immediately upon sentencing.

Appendix A

29. The $40 per prisoner per day compensation figure and the 7 day period from sentencing for compensation to accrue are reasonable for periods occurring from and after March 2, 1990.

30. The backlog of State prisoners in county jails has had the following effect: a) detrimentally affected the provision of local law enforcement services; b) diluted any deterrent effect that felony convictions might otherwise have on persons on whom prison terms are imposed by state judges and juries because their sentences are not being carried out with reasonable dispatch and certainty; and c) further eroded public confidence in Texas' criminal justice system.

31. The Counties' records regarding the number of State prisoners backlogged and the amount of time such prisoners were held in county jails and summaries of such records were examined by TDC's expert auditors from Price Waterhouse, and the number of prisoner days contained in these findings is consistent with the calculations made by Price Waterhouse for TDC.

32. A conservative estimate of the cost to TDC if TDC had taken actual physical custody of the State prisoners involved in this action is at least between $37.00 and $47.00 per prisoner per day.

33. The Crowding Stipulation which is the consent agreement in *Ruiz* in which TDC agreed not to exceed capacity limits set out therein has been modified on several occasions pursuant to TDC's good faith requests for modification.

34. TDC's request for modification in *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987), with regard to use of the Fort Wolters substandard facilities was not a reasonable request because of the serious deficiencies in those facilities.

Appendix A

35. TDC has taken a proactive role in requesting additional funds to comply with the agreements and orders in *Ruiz v. Lynaugh*, Civil Action No. H-78-987 (S. D. Tex.).

36. Despite their awareness of the backlog in county jails of State prisoners, TDC has not requested funds to provide for these State prisoners.

37. The federal court orders on which TDC bases its *res judicata*, collateral estoppel, and issue preclusion defenses do not reach the issue of TDC's duty to take State prisoners or to compensate the Counties for holding State prisoners.

38. A proposed amendment to Title 108, Revised Civil Statutes,adding article 6166a-3 which provided that the Texas Department of Corrections was not required to accept an inmate if such acceptance would cause the Texas Department of Corrections to exceed ninety-five percent of its capacity was rejected by the 71st Legislature.

39. The only documents required under article 42.09 of the Code of Criminal Procedure prepared after judgment and sentencing are the standardized felony judgment form and the statement of facts form which is required only if the standardized felony judgment form has not been modified to include citation to the Penal Code or other provision under which the convicted felon was sentenced to serve a term in the State penitentiary.

40. The standardized felony judgment form, which is used by all of the State district courts for sentencing persons to the State penitentiary, can be completed in five minutes or less.

41. All other documents provided pursuant to article 42.09 of

the Code of Criminal Procedure including the offense report, indictment, arrest record, change of venue statement, and criminal history are prepared prior to judgment and sentencing.

42. Even if the paperwork required by article 42.09 of the Code of Criminal Procedure is submitted to TDC prior to prisoners' transfer to the Institutional Division of the Texas Department of Criminal Justice, the paperwork is not reviewed or officially accepted until the prisoners are actually physically accepted by TDC at the Diagnostic Unit of the Institutional Division of the Texas Department of Criminal Justice.

43. Some of the alternatives available to TDC to take and make provisions for State prisoners are politically unpopular.

44. A backlog of State prisoners in county jails, which at some times amounted to approximately one-fourth of all convicted felons, was created by TDC's refusal to carry out its mandatory duty.

CONCLUSIONS OF LAW

1. This mandamus action is not precluded or otherwise barred by sovereign immunity.

2. A mandamus action to compel TDC to carry out its mandatory duty is not a suit against the State.

3. Adequate relief can be granted in this case without the joinder of all Texas counties and all State prisoners in county jails.

4. TDC has a clear, mandatory, non-discretionary legal duty to take and make provision for State prisoners in the categories

involved in this case within a reasonable time after they are sentenced to confinement in the State penitentiary.

5. The Counties — having established that TDC has a mandatory duty to take and make provision for such prisoners within a reasonable time, that the Counties have demanded that TDC perform its mandatory duty, and that TDC has refused their demands — have established the necessary elements for the granting of a writ of mandamus.

6. The burden of proof to establish impossibility or any other defense is on TDC.

7. TDC has not established impossibility or any other defense to the issuance of a writ of mandamus.

8. Neither TDC's Scheduled Admissions Policy, the Crowding Stipulation, nor any order issued in *Ruiz* preempts, modifies or nullifies TDC's State law duty to make provisions for the sentenced felons involved in this case nor prohibits the granting of mandamus.

9. The Counties have no adequate remedy at law other than this mandamus action.

10. TDC has authority to plan for prison population pressures and to carry out its mandatory duty to take and to make provision for convicted felons through various means.

11. Means available to TDC to carry out its mandatory duty to take and to make provision for State prisoners include: a) transferring funds between fiscal years and appropriations for various programs administered, supervised and operated by the

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Texas Department of Criminal Justice and the Texas Board of Criminal Justice; b) contracting with private vendors, counties, or the federal government to care for prisoners sentenced to the State penitentiary; c) greater or continuous use of the Prison Management Act, furloughs, or good conduct time.

12. The political unpopularity of some of the alternatives available to TDC to carry out their mandatory duty does not make it impossible for TDC to utilize these or other alternatives to perform its duty.

13. Counties are authorized to act only pursuant to statutory or constitutional provisions directly imposing duties on counties or necessarily implied in order to carry out such constitutionally or statutorily imposed duties.

14. No statutory or constitutional provisions or other law transfers to the Counties TDC's mandatory duty to take and to make provisions for the categories of prisoners involved in this case.

15. TDC has a clear, mandatory, nondiscretionary duty to make provisions for the proper care, treatment, feeding, clothing, and management of the prisoners involved in this case.

16. Inherent in and integral to TDC's duty to accept and to make provisions for the care and management of the prisoners involved in this action is the financial responsibility for the carrying out of TDC's duty.

17. TDC's default in performing its duty to make provisions for the care and management of the prisoners involved in this case does not transfer to the Counties TDC's duty or the financial responsibility for carrying out that duty.

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18. TDC has a mandatory duty to compensate the Counties for services provided by the Counties in holding State prisoners that TDC should have taken.

19. Payment of compensation by TDC to the Counties may be mandated by this Court because TDC has failed to take the prisoners or to be financially responsible for them when it has a clear, mandatory, nondiscretionary duty to do so.

20. A writ of mandamus may issue against TDC to raise revenue to carry out its mandatory duty even though exactly how the revenue is to be raised may be left up to TDC, and even though TDC may have to look at third parties as a source of revenue.

21. TDC must seek and obtain or raise the revenues necessary to carry out its mandatory duty and to compensate the Counties when the Counties are required to hold State prisoners because of TDC's default.

22. An effective judgment and peremptory writ of mandamus in this action require the inclusion of provisions ordering TDC to compensate the Counties when they are holding State prisoners because of TDC's default in carrying out its mandatory duty to make provisions for such prisoners.

23. This action is a mandamus action is not an action for damages sounding in contract or tort.

24. The compensation awarded in this case is incident to this mandamus action and is not an award of damages.

25. Res judicata, collateral estoppel, or issue preclusion do not bar this action or constitute a defense to the issuance of a judgment

and peremptory writ of mandamus against TDC in this mandamus action.

26. Where, as in the instant case, a demand for performance of a mandatory duty would be futile the usual requirement for a formal demand and refusal may be dispensed with in a mandamus action.

27. TDC's duty to take and make provisions for the categories of prisoners involved in this action continues after the adoption of an allocation formula pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990).

28. The Counties' failure to prepare and present to TDC the paperwork required to accompany prisoners transferred to the State penitentiary does not relieve TDC of its mandatory duty to make provisions for such prisoners within a reasonable time after their sentencing to terms in the State penitentiary because preparation and presentation of such paperwork would have been futile.

29. The adoption of an allocation formula under Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990) does not shift or transfer TDC's mandatory duty to the Counties.

30. The measure of compensation to be paid to the Counties is the reasonable value of the services the Counties have provided in holding State prisoners that TDC should have taken.

31. The measure of what constitutes a reasonable time for TDC to either take the prisoners or compensate the Counties holding the prisoners because of TDC's default is the amount of time it would reasonably take to perform the task of preparing the transfer paperwork and arranging for the transportation of the

prisoners if TDC were accepting the prisoners.

32. The paperwork requirements authorized by article 42.09 of the Code of Criminal Procedure do not alter or nullify TDC's duty to carry out judgments sentencing prisoners to the State penitentiary but rather create procedural and administrative requirements that are to be met at the time that prisoners are actually physically transported and transferred to the State penitentiary.

33. TDC is not required to compensate the Counties for days that State prisoners are held by the Counties pending parole revocation hearings, trial on other offenses, appeals of sentences of ten years or less when the prisoners have not elected to be transferred to the State penitentiary immediately upon sentencing, or dispositions of matters for which such prisoners are being held at the request of federal law enforcement authorities.

34. TDC's duty to take State prisoners or to compensate the Counties for holding such prisoners continues after March 2, 1990, as well as before that date.

35. TDC is liable for post-judgment interest at the rate of 10% in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1980).

36. TDC is liable for costs of suit.

Signed this 26th day of November, 1990.

s/ Joseph H. Hart
JOSEPH H. HART
Judge Presiding
Travis County, Texas

APPENDIX B — JUDGMENT DATED AUGUST 22, 1990 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

No. 452,071

IN THE DISTRICT COURT, TRAVIS COUNTY, TEXAS
250TH JUDICIAL DISTRICT

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS: DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

JUDGMENT

The above entitled cause came on for hearing before this Court on October 2 through 5, 1989, and April 30 through May 2, 1990. Relator Nueces County, Texas, and Intervenors, Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis and Victoria Counties, Texas, (the Counties) appeared through their attorneys, and Respondents, Texas Board of Criminal Justice (successor to the Texas Board of Corrections), Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, Jr., James Eller, Pedro Diaz, Jr., Mamie Proctor, Robert Mann, Allan B. Polunsky, members of the Texas Board of Criminal

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Justice, James A. Lynaugh, Executive Director of the Texas Department of Criminal Justice, and James A. Collins, Director of the Institutional Division of the Texas Department of Criminal Justice, appeared through their attorney.

On April 18, 1989, and September 9, 1989, this Court granted partial summary judgment finding that Respondents had a mandatory, non-discretionary duty to take custody of prisoners sentenced by a trial court to the custody of Texas Department of Corrections ("TDC") or to its successor agency, the Texas Department of Criminal Justice ("TDCJ").

After presentation of testimony, evidence and argument of counsel at the October 2 through 5, 1989 hearing, the Court found that Respondents had not established legal impossibility or any other defense that would prevent issuance of a writ of mandamus. The Court also found that Respondents must reasonably compensate Relator and Intervenor Counties (the "Counties") for holding such prisoners if Respondents failed to take custody of such prisoners within a reasonable time.

After presentation of testimony, evidence and argument of counsel at the April 30 through May 2, 1990 hearing regarding what constitutes reasonable compensation and a reasonable time to take prisoners, the Court found that Respondents shall compensate Relator and Intervenor Counties for holding prisoners at the rate of Forty Dollars ($40.00) per day for each prisoner sentenced to the custody of the TDC or its successor agency, TDCJ; and further found that the compensation owed by the Respondents should begin to accrue seven (7) days after the date of the judgment and sentence of the court ordering confinement in the TDC or TDCJ. The evidence regarding the number of days that such prisoners were held in the Counties' jails after sentencing

for the period beginning September 28, 1987 up to and including February 28, 1990 was uncontrovered by the parties.

The Court has further found that Respondents' adoption effective March 2, 1990, of an allocation formula under the provisions of Tex. Rev. Civ. Sta. Ann. art. 6166a-4 (Vernon Supp. 1990) does not alter or shift to the Counties the Respondents' duty to take prisoners sentenced to the custody of the TDC or TDCJ, or to compensate the Counties for holding such prisoners.

After presentation of further testimony, evidence and argument of counsel at a hearing on August 8, 1990 concerning the applicability of the Forty Dollar ($40.00) amount and seven (7) day period after March 2, 1990, the effective date of the allocation formula, the Court found that after the adoption of the allocation formula Respondents shall compensate Relator and Intervenor Counties at the rate of Forty Dollars ($40.00) per day for each prisoner sentenced to the custody of the TDC or its successor agency, TDCJ; and further found that the compensation owed by the Respondents for post allocation formula periods should begin to accrue seven (7) days after the date of the judgment and sentence of the court ordering confinement in the TDC or TDCJ.

ACCORDINGLY, the Court is of the opinion that judgment should be rendered in favor of the Counties and that a Writ of Mandamus should be issued to compel Respondents to perform said duty.

IT IS, THEREFORE, ORDERED:

1. That a preemptory Writ of Mandamus issue directing and commanding Respondents, Texas Board of

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Criminal Justice, Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, James Eller, Mamie Proctor, Robert Mann, Allan B. Polunsky, James A. Lynaugh, and James A. Collins to cause the Texas Department of Criminal Justice to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the TDCJ or to its predecessor, the TDC, or to compensate the Counties at a rate of Forty Dollars ($40.00) per day for each such prisoner held in the Counties' jails (including prisoners held in facilities with which the Counties have contracted) and to raise any revenue necessary to pay such compensation.

2. That Respondents' duty to provide for the care and custody of prisoners sentenced to the TDCJ or to its predecessor, TDC, or to pay compensation to the Counties for holding such prisoners, shall begin seven (7) calendar days after issuance of judgment sentencing and committing such prisoners to the TDCJ, or to its predecessor, the TDC.

3. That Respondents shall pay to the Counties the following amounts as the aggregate amount of compensation due to each County for all periods beginning September 28, 1987 up to and including February 28, 1990, for holding prisoners that were Respondents' responsibility under this Judgment:

Nueces	$ 5,730,640
Bexar	$16,150,000

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Collin	$ 3,092,720
Dallas	$33,949,600
El Paso	$ 8,814,680
Galveston	$ 3,441,520
Hidalgo	$ 2,520,520
Hunt	$ 828,680
Lubbock	$ 3,687,920
Tarrant	$15,080,840
Travis	$ 6,839,480
Victoria	$ 184,840

4. That Respondents shall pay to the Counties compensation in accordance with this Judgment for prisoners held by the Counties on or after March 1, 1990, that are the responsibility of Respondents. In computing the prisoner days for which compensation is owed from Respondents to the Counties, the Counties shall exclude days during which prisoners have elected, to the extent permitted by law, to remain in county jail; and days that prisoners are confined in county jail awaiting resolution of other judicial proceedings (e.g., persons on bench warrants or who are subject to detainer) prior to transfer to the TDCJ or its predecessor, the TDC.

5. That the Counties shall submit invoices to Respondents for payment of compensation for prisoners held by the Counties on or after March 1, 1990 (including prisoners held in facilities with which the Counties have contracted), for which Respondents are responsible under this Judgment, together with copies of the judgments of

commitment to the TDCJ or to its predecessor, the TDC, that correspond to the prisoners covered by the invoices.

6. That the Counties' invoices for compensation for the period from and after March 1, 1990 to the date of entry of this Judgment, shall be presented to Respondents by each County by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which this Judgment is entered. Thereafter, the Counties' invoices for compensation shall be presented by each County to Respondents by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which compensation to the County accrues under this Judgment.

7. That the Judgment hereby rendered shall bear interest in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of ten percent (10%) from the date of judgment until paid.

8. That costs of suit be taxed against Respondents.

IT IS FURTHER ORDERED that Respondents shall not by this Judgment be relieved of carrying out their obligations under any other relevant order issued by a court of competent jurisdiction, including the agreed orders Respondents have entered into in *Ruiz v. Lynaugh*, No. 78-087-CA; provided, however, that

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Respondents shall not be precluded from seeking modifications to such orders.

This Judgment should not be considered to contain findings of facts or conclusions of law.

SIGNED this 22nd Day of August, 1990

s/ Joseph H. Hart
JOSEPH H. HART, Judge
126th Judicial District Court
Travis County, Texas

APPROVED AS TO FORM:
HONORABLE JIM MATTOX
ATTORNEY GENERAL OF TEXAS

By:
MICHAEL P. HODGE
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APPENDIX C — PEREMPTORY WRIT OF MANDAMUS DATED AUGUST 22, 1990 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

NO. 452,071

IN THE DISTRICT COURT, TRAVIS COUNTY, TEXAS
250TH JUDICIAL DISTRICT

THE COUNTY OF NUECES, TEXAS,

Relator,

vs.

TEXAS BOARD OF CORRECTIONS; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; DERALYN DAVIS; JAMES ELLER; DENNIS R. HENDRIX; JOE V. LAMANTIA, JR.; ROBERT MANN; ALLAN B. POLUNSKY; JAMES A. LYNAUGH,

Respondents.

PEREMPTORY WRIT OF MANDAMUS

On April 18, 1989 and September 9, 1989 this Court granted partial summary judgment in the above numbered and styled cause finding the Respondents, Texas Board of Criminal Justice, Charles T. Terrell, Jerry H. Hodge, F. L. Stephens, Ben Gallant, Jr., James Eller, Pedro Diaz, Jr., Mamie Proctor, Robert Mann, Allan B. Polunsky, James A. Lynaugh, and James A. Collins have a mandatory, nondiscretionary duty to take custody of inmates sentenced by a trial court to the custody of Texas Department of Corrections or its successor agency Texas Department of Criminal Justice.

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On October 2-5, 1989 and April 30-May 2 and August 8, 1990, in hearings in the above-numbered and styled cause this Court further found that Respondents had not established legal impossibility or any of the defenses that would preclude issuance of a writ of mandamus and that Respondents have a duty to reimburse the Relator Nueces County, Texas and Intervenors Bexar, Collin, Dallas, El Paso, Galveston, Hidalgo, Hunt, Lubbock, Tarrant, Travis, and Victoria Counties, Texas ("Counties") by paying them reasonable compensation in the amount of $40 per day for the care, treatment, feeding, clothing and management of the inmates that the State should have taken. The compensation should begin to accrue seven days after the date of the judgment and sentence of the court ordering confinement in the Texas Department of Corrections, or the successor agency, the Texas Department of Criminal Justice. Respondents have a duty to take all actions necessary to obtain funds required to pay such amounts of compensation.

The Counties have demanded that Respondents perform their duty to take inmates and Respondents have unjustly refused and still refuse to take or make provisions for the inmates.

Respondents show by their acts of refusal to perform the ministerial duty to take the inmates that it is futile for the Counties to issue formal demands for compensation and this Court dispenses with the need for a formal demand and refusal.

The Respondents' failure to fulfill their duty as outlined above has resulted in manifest injury to the Counties.

Therefore, this Court commands Respondents to provide for the care and custody of all prisioners sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice

or its predecessor the Texas Department of Corrections, or to compensate the Counties at the rate of $40 per day for each such prisoner held in the Counties' jails (including prisoners held in facilities with which the Counties have contracted) after seven days from the date of judgment and sentence.

This Court further commands Respondents to pay to the Counties the aggregate amount of compensation at the rate of $40.00 per day which has accured for all periods up to and including February 28, 1990, for holding prisoners (including prisoners held in facilities with which the Counties have contracted) that Respondents failed to provide for under Respondents' duty to provide for the care and custody of all persons sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections and to continue paying amounts that become due until such time as Respondents carry out their duty as outlined above. The aggregate amounts due each County are:

Nueces	$ 5,730,640
Bexar	$16,150,000
Collin	$ 3,092,720
Dallas	$33,949,600
El Paso	$ 8,814,680
Galveston	$ 3,441,520
Hidalgo	$ 2,520,520

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Hunt	$ 828,680
Lubbock	$ 3,687,920
Tarrant	$15,080,840
Travis	$ 6,839,480
Victoria	$ 184,840

Further, this Court commands Respondents to take all action necessary to obtain funds to pay reasonable compensation.

You are hereby further commanded to make return to this writ before this Court on November 26, 1990 at the Travis County Courthouse, stating how you have executed or what you have done in compliance to this writ and have you then and there this writ.

Signed this 22nd day of August, 1990

s/ Joseph H. Hart
Joseph H. Hart, Judge
126th Judicial District Court
Travis County, Texas

APPENDIX D — LETTER DECISION DATED MAY 31, 1990 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
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May 31, 1990

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Appendix D

Re: Cause No. 452,071; The County of Nueces, Texas
vs. Texas Board of Corrections, et al.

Dear Counsel:

In the letter decision of November 21, 1989 I held that the counties had proven all elements necessary for the issuance of a writ of mandamus to take prisoners committed to TDC and that the State failed to prove the defense of impossibility. I held that a mandamus would also issue requiring TDC to reimburse the counties the reasonable amounts for the care, treatment, feeding, clothing and management of the inmates that the State should have taken and to raise the revenues required to pay such amounts. In that letter I did not reach the question of the effect of the allocation formula (37 T.A.C. 152.3) on TDC's duty to take the prisoners or reimburse the counties. At that time the statutorily required allocation formula had not yet taken effect, and TDC was refusing to take prisoners on the basis of its own admissions policy. On March 2, 1990, the formula became effective, and the question is now ripe for decision.

The question remaining in the November 21, 1989 letter was whether prisoners which were not taken by the state because of the formula could be considered as "committed to the county jails by lawful authority" [Local Gov't Code Ann. § 351.041(a) (Vernon 1988)]. If so, then arguably the counties would be liable for the expenses of care of the prisoners. Tex. Crim. Proc. Code Ann. art. 104.002(a) (Vernon Supp. 1989); *See* Tex. Att'y Gen. Op. Nos. JM-615, JM-730 and JM-743. I hold that article 6166a-4 [Tex. Rev. Civ. Stat. Ann. art. 6166a-4 (Vernon Supp. 1990)] and the allocation formula cannot be read to require the counties to pay for the prisoners which have been committed to TDC by

lawful court order but which the state has refused to take by default.

I have outlined below generally the reasons for my decision. Again, this letter should not be considered findings of fact or conclusions of law nor is it intended to preclude other findings or conclusions not expressed in the letter.

The statutes by which prisoners are sentenced to TDC are clear and unambiguous. They clearly provide that individuals convicted of felonies "shall be punished by confinement" in TDC and that TDC shall transport the prisoners to the state penitentiary. Tex. Penal Code Ann. §§ 12.31-12.34 (Vernon 1988); Tex. Crim. Proc. Code Ann. art. 42.09 (Vernon 1988); Tex. Rev. Civ. Stat. Ann. art. 6166r (Vernon Supp. 1989).

On the other hand, article 6166a-4, on which the state relies, is ambiguous at best. Insofar as the responsibility for housing felons is concerned, it calls for the development of a formula which "allocates. . .to each county. . . the number of institutional division admissions allocated to the county. . . .until sufficient capacity is available." It neither expressly relieves the state of the duty to take and confine felons nor expressly places that duty on the counties. Only by inference can such an interpretation be reached. If article 6166a-4 is interpreted as TDC requests, however, this ambiguous statute will have the following effects:

1. H.B. 2335 which places the "primary responsibility" for the confinement, supervision and rehabilitation of felons on the Texas Department of Criminal Justice will be rendered meaningless. Act of June 15, 1989, Ch. 785, art. 1, § 1.02, 1989 Tex. Sess. Law Serv. 3471 (Vernon) (H.B. 2335).

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2. The statutes cited above which unambiguously require that TDC confine felons will, in effect, be repealed.

3. The portions of the court orders which sentence felons to TDC will be meaningless.

4. New duties will be placed on the counties which they have never had before, possibly in violation of article 5, § 18(b) of the Texas Constitution. Conversely, the State will be relieved of duties clearly placed on it by statute.

5. The taxpayers of the affected counties will have to shoulder a tremendous financial burden which under the unambiguous statutes should be borne by the whole state. Governor Clements has stated:

> It is totally wrong to house state prisoners in county jails.
>
> Convicted felons should serve their sentences behind prison walls — *not in crowded county jails at local taxpayer expense.*
>
> Clements, *Message from the Governor*, 1 Texas Criminal Justice Intelligence, No. 3 (June/July 1988). (Emphasis added)

Even according to the state's figures based on incremental costs, the amount exceeds $36,000,000. The counties' figures are several times higher.

Had the legislature wished to have such a profound effect on the criminal justice system and the taxpayers of the affected

counties, it could have done so with clear, unambiguous language. For example, one part of H.B. 2335 explicitly allows "a period of detention in a county jail" for convicted felons. Tex. Crim. Proc. Code Ann. art. 42.12, § 12 (Vernon Supp. 1990).

Furthermore, as mentioned in the letter decision of November 21, 1989, an attempt was made to enact a statute to do exactly what the state requests that I do in this case, that is, relieve it from financial responsibility. A proposed amendment to article 6166a-3 would have stated specifically that TDC was "not required to accept an inmate for confinement if accepting will cause the department to exceed 95% of its capacity. . . ". The legislature failed to pass the proposed amendment; I will not by judicial construction perform an act which the legislature itself rejected.

The defendant is asking that I manufacture from the ambiguously worded article 6166a-4 precisely what the legislature failed to enact. The statutes clearly placing the responsibility on the state are in effect and should not be repealed by such a vague and ambiguous statute. *Meek v. Wheeler*, 125 S.W. 2d 331 (Tex. Civ. App. — Amarillo 1930) aff'd 144 S.W. 2d 885 (Tex. Comm'n App. 1940, opinion adopted). The repeal of clear, long standing statutes should not arise by implication. Sutherland, *Statutory Construction*, § 23.10 (4th Ed. 1984).

I hold, therefore, that article 6166a-4 does not relieve the state of its duty to take the prisoners or shift the responsibility to the counties. The addition of the allocation formula does nothing more than control the administrative process of allocating available space to the institutional division. The duty of the state to take felons sentenced to the custody of the state or reimburse the counties continues after March 2, 1990.

Appendix D

Thank you.

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/jw

APPENDIX E — LETTER DECISION DATED NOVEMBER 21, 1989 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
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November 21, 1989

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Austin, Texas 78711-2548

Appendix E

Re: Cause No. 452,071; The County Nueces, Texas
vs. Texas Board of Corrections, et al.

Dear Counsel:

Based on the evidence, authorities and briefs submitted and arguments of counsel, I have reached a decision in this case. I have outlined below in general the bases for my decision. This letter should not be considered formal facts or conclusions of law, nor is it intended to preclude other findings or conclusions which may support the decision.

Question Presented

The ultimate question involved in this case is whether or not a mandamus should issue either to compel TDC to take convicted felons being housed by the counties or to pay for the costs of care and maintenance of such felons, or both.[1]

Elements

Before a mandamus may issue, there must be a mandatory, non-discretionary legal duty on the part of TDC to take the inmates, the Counties must have demanded that TDC perform such duty, and TDC must have refused to perform. *Stoner v. Massey*, 586 S.W. 2d 483, 486 (Tex. 1979). By a summary judgment I have already ruled that TDC has a mandatory, non-discretionary duty to take the inmates:

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1. "TDC" will be used to refer to the respondents Texas Board of Corrections, its members, the Department of Corrections and its director, although the names have now been changed to the Texas Board of Criminal Justice and Texas Department of Criminal Justice. Nueces County and the intervening counties will be referred to as "Counties".

Appendix E

1. The Penal Code states that individuals convicted of felonies "shall be punished *by confinement in the Texas Department of Corrections*" for various periods. Tex. Penal Code Ann. §§ 12.31-12.34 (Vernon 1988) (Emphasis added).

2. Under the Code of Criminal Procedure a convicted felon *must* be transferred to TDC, under certain ascertainable conditions, when his sentence is pronounced. Tex. Crim. Proc. Code Ann. art. 42.09 (Vernon 1988); *Ex Parte Rodriguez*, 597 S.W. 2d 771 (Tex. Crim. App. 1980).

3. Article 6166r states that the "director [of TDC] *shall* make suitable provisions. . .for the safe transportation of prisoners from counties where sentenced *to the State penitentiary*. . . ." Tex. Rev. Civ Stat. Ann. art 6166r (Vernon Supp. 1989). (Emphasis added).

4. Under H.B. 2335 the "department is the state agency with *primary responsibility for*: (1) the *confinement*, supervision and rehabilitation of felons." Act of June 15, 1989, ch. 785, art. 1, § 1.02, 1989 Tex. Sess. Law Serv. 3471 (Vernon) (H.B. 2335). (Emphasis added).

I have also ruled that the Counties have demanded that TDC perform its duty to take the inmates and that TDC has refused to do so. Therefore, under *Stoner* the Counties have satisfied the elements for the granting of a mandamus.

Mootness

TDC has suggested that due to the passage of H.B. 2335 this case has been rendered moot. I have previously overruled this suggestion. The primary changes resulting from H.B. 2335 were the removal of the word "speedy" as a modifier of

"transportation" from art. 6166r and the requirement that a formula should be developed in the future for allocating admissions from the counties to the TDC until a sufficient capacity is available.

The removal of the word "speedy" results only in the implication of a "reasonable" time in which to perform the transportation. Sutherland, *Statutory Construction,* § 55.03 (4th Ed. 1984). The allocation formula, under H.B. 2335 is yet to be devised or implemented; its impact on TDC's responsibilities after it does take effect is not ripe for decision. The question of TDC's past and current duties prior to the implementation of the allocation formula is before me and is not moot.[2]

Impossibility

The remaining question, and that addressed in the hearing beginning October 2, 1989, was whether the taking of prisoners by TDC that were ready for transfer from the counties is

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2. No other provision shifts to the counties, or relieves the state from the obligation to confine TDC ready prisoners. Had the legislature wanted to relieve TDC of its duty to accept the inmates, it could have done so. A proposed amendment to art. 6166a-3 "relating to duty of the state to house felons" stated that the "Texas Department of Corrections is not required to accept an inmate for confinement in the department if accepting will cause the department to exceed 95% of its capacity . . . ." That amendment was deleted. If the intent of the legislature was to relieve the state of its duty to take, such intent was not expressed in any enacted legislation and must be inferred. There is a presumption against the repeal of prior laws by implication, and this rule is especially applicable to laws, such as those in question, which are important public statutes of long standing. If legislators are to make such fundamental changes in the obligation of the department as suggested by TDC, they should designate the provision to be changed, ratheer than leaving the repeal to arise by implication. Sutherland, at § 23.10.

impossible. This was an affirmative defense expressly raised by TDC, and if proven, a mandamus could not issue. *Manion v. Lockhart*, 131 Tex. 175, 114 S.W. 2d 216, 219 (1938).

1. Burden of Proof

In my letter decision of March 21, 1989, I implied that the burden of proving impossibility would be on TDC. TDC proceeded at the trial on the question as though it did have the burden. TDC has now cited *King v. Guerra*, 1 S.W. 2d 373 (Tex. Civ. App. — San Antonio 1927, writ ref'd), for the proposition that the party seeking a mandamus has the burden to negative every fact that would have authorized defendant to refuse to take action. I do not believe that *King*, if it is still the law, applies to this case. *King* involved the denial by the Board of Commissioners of San Antonio of an application for the issuance of a permit authorizing the relator to construct and operate an undertaking establishment. In reaching its decision, the board had to weigh various factors involving the public health and welfare. The only question involved was "the validity of the *discretionary* act." *Id.* at 377 (Emphasis added). The essence of the ruling on burden of proof was that the board did not have the burden of proving the existence of the various factors it considered in denying the application. The matters in question were not actually affirmative defenses. Here, on the other hand, there is no discretion involved in determining the duty to take the prisioners. Prisoners have been convicted of crimes which require TDC to take charge of them. The affirmative defense has been raised that it is impossible to take them.

The law on this point is, I believe, more accurately set out in the following authorities:

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55 C.J.S. "Mandamus" § 325 (1948):

"The burden of proof is on respondent to prove matters set up in defense. . . ."

53 Am. Jur. 2d "Mandamus" § 466 (1970):

"Where, however, the right and the duty appear, the burden of proving matter set up by way of excuse for failure to act, or of justifying such failure to act, rests upon the respondent or defendant. And if the petitioner makes out a prima facie case for the issuance of the writ, the burden of refuting it is on the respondent."

One author on the subject has summarized the law as follows:

"The conduct of the trial in mandamus differs in no respect from the trial of any civil action, the burden of proof being governed by the general rule that the party holding the affirmative of the issue must establish his allegations by a preponderance of the evidence. The burden of establishing a clear legal right to the relief sought is therefore primarily on relator. [M]atter in avoidance alleged in the return, if denied by relator, must be proved by respondent.

"Following the general rule, affirmative averments in the answer, as fraud, are upon respondent to prove." Ferris, *The Law of Extraordinary Legal Remedies*, 304-306 (1926).

Texas cases more in point than *King* have followed the position in the authorities set out above. In *City of Beaumont v. Stephenson*, 107 S.W. 2d 915, 917 (Tex. Civ. App. — Beaumont 1937, writ dism'd) a mandamus was sought against the city to

require it to pay a draft. The city alleged that relator did not show that the city had available funds sufficient to pay the draft. The Court held that "this point was one of defense to be pleaded and supported by proof by [respondents]."

In *Simpson v. Williams Rural High School District*, 153 S.W. 2d 852, 855 (Tex. Civ. App. — Amarillo 1941, writ ref'd) a mandamus was sought to order the school board to sign and affix the corporate seal of the school district to bonds to allow payment on interest coupons. The obligation represented by the interest coupons was valid. Respondent sought to defeat the mandamus based on fraud and false representations. The Court placed the burden of proof of affirmative defenses on respondent:

> In order for the appellees to defeat appellant's suit because of false representations, it was necessary for them to show that the appellant or his agent made representations which were false, were as to material facts, were made with the intent and design to induce appellees to refund the interest coupons and that such representations were relied upon by them. The testimony wholely fails to establish the elements constituting fraud based on false representations.

Like the fraud in *Simpson*, impossibility is also an affirmative defense for which I hold respondent has the burden of proof.

2. Proof of impossibility

The question remaining is whether or not respondent has met its burden and proven impossibility. I hold that it has not.

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I have already held that the *Crowding Stipulation* in *Ruiz v. Lynaugh*, Civil Action No. H-78-987 (S.D. Tex.), which requires a 95% population cap in TDC does not in itself make compliance with a writ of mandamus an impossibility. Other than a modification of the *Crowding Stipulation*, there are various measures that could be taken by TDC to take the prisioners from the counties. I do not believe that a preponderance of the evidence indicates that these other measures cannot be used. While each alone may not allow TDC to take all the prisioners from the counties, that does not mean that in combination all or part of the prisoners could not be removed from the county jails. Such other methods include contracting with private vendors, the federal government, and local governments and greater use of the Prison Management Act, [Tex. Rev. Civ. Stat. Ann. art 6184o (Vernon Supp. 1984)], furloughs, and good time.

Some of the measures would be costly; some are perceived to be politically unpopular. These factors, however, do not make the carrying out of TDC's mandatory duty impossible. Funds appear to be available within the existing appropriation bill, pursuant to several riders, including riders 8, 45, 56 and 57. Further, statutory authority exists for contracting with counties and private vendors and with the federal government. Texas Gov't. Code Ann. §§ 494.001, 494.021 and § 494.022. (Vernon Supp. 1989).

TDC has argued that the counties could make greater use of diversionary programs called for in H.B. 2335. However, the possible use of the diversionary programs at the local level does not relieve TDC of any duty to take the prisioners nor does it create an impossibility.

I find, therefore, that TDC has not met its burden of showing impossibility.

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Mandamus to Take

All elements for the issuance of a mandamus having been proven by the counties, and TDC having failed to prove by a preponderance of the evidence that it would be impossible to take the prisoners, the mandamus will issue requiring TDC to take the state ready prisoners within a reasonable time. As I have held previously, while there may be some limited flexibility as to when prisoners are to be accepted, I hold that Texas statutes do not vest discretion in TDC to delay accepting state-ready inmates on the basis of relative overcrowding at state and local facilities. *Ayres v. Coughlin*, 72 N.Y. 2d 346, 530 N.E. 2d 373, 533 N.Y.S. 2d 849 (1988). That is, the fact of overcrowding will not be considered relevant to the question of what is a reasonable time to receive prisoners.

Mandamus to Reimburse or Pay

The Counties have also sought a mandamus for TDC to pay or reimburse them for the costs of housing prisoners that are TDC ready. As held above, TDC does have an obligation to take the prisioners. Therefore, normally the prisoners would be transported to and confined in TDC. Tex. Penal Code Ann. §§ 12.31-12.34; Texas Crim. Proc. Code Ann. art. 42.09; art. 6166r.

Had TDC met its statutory obligations and confined the felons in TDC, then the financial burden would clearly be on TDC. Article 6166g provides that the Texas Board of Corrections and the director:

> shall be responsible for. . . the proper care, treatment, feeding, clothing and management of the prisoners confined therein.

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Tex. Rev. Civ. Stat. Ann. art. 6166g (Vernon 1970).

Questions have previously arisen as to whether or not prisoners who are in the legal, but not physical custody of TDC, similar to the situation in this case, could be considered "confined therein" within the meaning of article 6166g. Attorney General opinions have discussed the comparative responsibility between counties and TDC in such situations, for example, for medical costs where a TDC prisoner was in a county jail awaiting hearing on a violation of parole conditions [Tex. Att'y Gen. Op. No. JM-743(1987)] or in the county jail from TDC on a bench warrant [Tex. Att'y Gen. Op. No. JM-730 (1987)]. The Attorney General considered article 6166g along with article 104.002(a) [Tex. Crim. Proc. Code Ann. art. 104.002(a) (Vernon 1988)] which states that a county is liable for expenses incurred in the safe keeping of prisoners confined in the county jail. He concluded that "confined therein" meant the physical presence of the prisoner in TDC was necessary before TDC, rather than the counties, would be liable for the prisoners' expenses.[3]

However, Opinion Nos. JM-730 and JM-743 must be construed in light of art. 5116 (Vernon 1987) [now Tex. Local Gov't Code Ann. § 351.041(a) (Vernon 1988)], as was done in Att'y Gen. Op. No. JM-615 (1987). Article 5116 states that the sheriff shall safely keep in jail "all prisoners committed thereto *by lawful authority*, subject to the order of the proper court. . . "

---

3. Article 6166g has been changed and is now art. 492.001(a) of the Government Code. The phrase "prisoners confined therein" has been dropped and replaced by "inmates." A question could arise, therefore, as to whether it is still necessary that prisoners be physically confined in TDC for TDC to be responsible for their care. I will interpret the phrase "prisoners confined therein" to be synonymous with the word "inmates" for purposes of this decision.

(Emphasis added). In other words, as long as TDC prisoners are committed to a county jail *under lawful authority*, the county is responsible for their care, even though they may be in the legal custody of TDC. In the situations described in Opinion Nos. JM-615, JM-730 and JM-743, TDC prisoners were required to be in the county jails by law (thereby complying with art. 5116); therefore, the counties were liable for expenses for care of the prisoners under art. 104.002 of the Code of Criminal Procedure.

Here, however, the situation is completely different. The prisoners have been committed to the custody of TDC by the trial courts. They are in the county jails not under lawful authority, such as under a bench warrant or for a parole violation hearing, but by default. The admissions policy used by TDC violates its statutory duty to take prisoners and, therefore, can not be considered lawful authority. The question is, therefore, as follows: Can TDC merely by defaulting on its obligations and by refusing to take the prisoners (so that they are not physically "confined therein") shift the burden and cost of housing and caring for the TDC-ready prisoners to the taxpayers of the counties where those prisoners are being housed (although not "under lawful authority")?

I hold that it cannot and that responsibility for the proper care, treatment, feeding, clothing and management of the TDC-ready prisoners is on the state, not the Counties.[4]

---

4. Under art. 5115.1, § 11 (Vernon 1987) [Now Tex. Gov't. Code Ann. § 511.012 (Vernon 1989)] and Attorney General Opinion MW-398 (1981) the Commission on Jail Standards can require a county to accept prisoners from another county's jail that does not comply with minimum jail standards. The statute requires that the county of the non-complying jail bear the costs of transportation and maintenance of the prisoners. It is interesting that the state

(Cont'd)

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Where a county incurs costs as a result of performing the public obligation of another public entity, the other entity may be required to reimburse the performing county. *Orange County v. Cow Bayou Canal Co.*, 143 S.W. 963 (Tex. Civ. App. — Galveston 1912, no writ). The primary responsibility for confinement of felons is expressly placed on TDC. H.B. 2335, art. 1, § 1.02(a). Where a governmental body refuses to appropriate or pay when it has the clear, statutory duty to do so, payment may be mandated by the district court. *Vondy v. Commissioners of Uvalde County*, 620 S.W. 2d 104 (Tex. 1981) (mandamus against County Commissioners to set a reasonable salary for the constable).[5] Where an amount is owed that is not fixed, the county still may be mandamused to calculate a reasonable amount, even if it may require an additional decision by the respondent as to what is reasonable. *Id.* at 109.

Where the funds to pay may not be available, a mandamus may issue against a governmental authority to "raise revenue" even though exactly how the revenue is to be raised may be left up to the authority and even though the authority may have to look to third parties as a source for the revenue. *Hawthorne v.*

(Cont'd)
is willing to require non complying counties to reimburse other counties who cover for their deficiencies while the state is not itself willing to do the same when counties cover for the *state's own non-compliance* with federal standards.

5. Another basis for the holding in *Vondy* was the inherent power of the court to protect and preserve the proper administration of the judicial system. This ground is arguably present here, as judicially ordered sentences could not be carried out without means to incarcerate as required by law, i.e. without confinement in TDC. I do not base my decision on the inherent power of the judiciary, however.

La-Man Constructors, Inc., 672 S.W. 2d 255 (Tex. App. — Beaumont 1984, no writ). In addition, a mandamus may issue to pay an amount owed if and when funds are lawfully available or when the voters approve an appropriate tax levy. *Coulson v. Harris County MUD No. 29*, 678 S.W. 2d 726 (Tex. App. — Houston [14 Dist] 1984, writ ref'd n.r.e.). Courts may dispense with a formal demand for payment and refusal where the respondent shows, as it does here, that such a demand would be futile, *see, e.g., City of Austin v. Cahill*, 99 Tex. 172, 88 S.W. 542, 545 (1905) or where the respondent has neglected and refused to perform its ministerial duty, as TDC has done in refusing to take the prisoners. *Lake L.B.J. MUD v. Coulson*, 771 S.W. 2d 145, 156 (Tex. App. — Austin 1988), *aff'd in part and rev'd in part on other grounds*, 32 Tex. Sup. Ct. J. 442, 447 (June 10, 1989) (The Supreme Court affirmed the holding of the Court of Appeals that the Texas Water Code does not authorize the issuance of a mandamus to collect a judgment debt created by the same judgment.)

An interpretation of article 6166g [now Government Code § 492.001(a)] that the TDC could refuse to be financially responsible whenever it wished and for whatever reason so long as the inmates were not physically confined in TDC would render § 492.001(a) and TDC's duty to care for inmates meaningless. *Cf. Vondy*, 620 S.W. 2d at 109.

Therefore, I hold, that a mandamus will issue requiring TDC to pay the reasonable costs that the Counties have incurred in the care, treatment, feeding, clothing and management of the inmates, and to raise the revenue to pay such costs.

I do not decide at this point what amount should be paid (*Vondy*) or from what sources such funds should come

(*Hawthorne*). The determination of the amount of the reasonable costs will initially be left to TDC. I urge TDC and the Counties to confer together to resolve this issue. The source of the funds is a decision to be made by TDC.

A holding that TDC is financially responsible does not mean that it is relieved of the statutory duty to house TDC-ready prisoners. It means only that if by default TDC refuses to do so and the counties shoulder the responsibility where TDC has failed, then the counties must be reimbursed.

Conclusion

I would like to conclude this letter decision with a passage from a recent opinion by Justice Keltner in *Tarrant County Commissioner's Court, et al. v. Markham*, No. 2-89-097-CV (Tex. App. — Ft. Worth, September 28, 1989, n.w.h.) (not yet reported). While the opinion deals with Tarrant County jail overcrowding, the following passage is otherwise completely applicable to this case:

> All the parties admit that [the counties' jails] are over-crowded. Much of this blame is due to the failure of the State of Texas to meet its obligations to house inmates who have been committed to the Texas Department of Corrections (T.D.C.) by the order of state courts. *See* Tex. Code Crim. Proc. Ann. art. 42.09 (Vernon Supp. 1989).
>
> The sad truth is that the State of Texas fails to meet its obligations to incarcerate convicted felons because of the state's settlement agreement in the well-known *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.

1982). By its settlement, the State of Texas made several agreements regarding the incarceration of inmates, including an agreement to limit the inmate population incarcerated in T.D.C. In order to meet its obligations under the *Ruiz* settlement, the state has adopted a policy of refusing to accept inmates from county jails, committed to T.D.C., as is the state's obligation under law.

> The unhappy result is that there are two prison systems in Texas. One is operated "on the books" by T.D.C. and appears to meet the state's obligations under *Ruiz*. This prison system is financed by the State of Texas out of the state budget. The second Texas prison system is less visible to the public eye; but it exists in increasingly overcrowded county jails. In this system, inmates who have been committed to T.D.C. by state courts, are forced to languish in jails of the various counties throughout the state, because of the state's failure to accept the inmates committed to T.D.C. As a result, this second system is not financed out of the state's budget. Instead, these inmates committed to the T.D.C. are incarcerated at the cost of the various counties throughout Texas.
>
> The costs of these efforts are being borne by. . .County taxpayers for a function which is properly that of the State of Texas.

This holding is not (as suggested by TDC) an attempt by the court to substitute its own plan for dealing with prison overcrowding for the plan of the Legislature adopted in H.B. 2335.

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It is purely a determination that under the statutes as they now exist TDC has not been relieved of its responsibility to take felons committed to its custody. If the Legislature wishes to relieve TDC of that responsiblity, perhaps it may do so, but it must do so expressly. Until that time, TDC must comply with its obligation to take the prisoners or reimburse counties for housing and caring for them on its behalf.

This decision does not reach the question of the effect of the allocation formula on TDC's duty to take the prisoners or reimburse the Counties. The allocation formula required under art. 6166a-4 has not yet taken effect; therefore, the question is not before me. Will TDC's refusal to take prisoners from Counties pursuant to the statutorily mandated formula mean that the prisoners will be "committed" to the county jails "by lawful authority."? If so, will TDC then be relieved of its financial obligations under the reasoning expressed in Attorney General Opinion Nos. JM-615, 730 and 743? These, and possibly other questions are not now ripe for decision and will not be reached until they are.

I request that counsel for the Counties prepare a draft of a judgment in line with this decision and submit it to me for signature after approval as to form by opposing counsel.

Thank you.

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

Appendix E

JHH/jw
cc: Mr. John Dickson
Travis County District Clerk

APPENDIX F — LETTER DECISION DATED AUGUST 24, 1989 — *THE COUNTY OF NUECES v. TEXAS BOARD OF CORRECTIONS*

SEAL OF THE STATE OF TEXAS

JOSEPH H. HART
District Judge
126th Judicial District Court

P.O. BOX 1748
AUSTIN, TEXAS 78767

August 24, 1989

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Appendix F

Re: Cause No. 452,071; The County of Nueces,
Texas vs. Texas Board of Corrections, et al.

Dear Counsel:

I have decided that the suggestion of mootness filed by defendant should be denied. I request that Mr. Valdez prepare a draft of an order in line with this decision and submit it to me for signature after approval as to form by other counsel.

As things now stand, we will proceed with the hearing on October 2, 1989 at 9:00 a.m. on the question of impossibility. Please try to stipulate to as many uncontested facts as possible so as to reduce unnecessary in-court testimony. Also, please let us know your current estimates of length of time for the hearing.

Thank you.

Very truly yours,

s/ Joseph H. Hart
JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/jw
cc: Mr. John Dickson
Travis County District Clerk

APPENDIX G — FINAL JUDGMENT FILED AUGUST 2, 1991 — *HARRIS COUNTY v. THE STATE OF TEXAS*

No. 475,468

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

Plaintiff/Relator

vs.

THE STATE OF TEXAS; ANN RICHARDS, GOVERNOR OF THE STATE OF TEXAS; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JAMES LYNAUGH, DIRECTOR; TEXAS BOARD OF CRIMINAL JUSTICE; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; BEN GALLANT, JR.; JAMES ELLER; MAIME MOORE PROCTOR; ROBERT MANN; AND ALLAN B. POLUNSKY; AS MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE

Defendants/Respondents

FINAL JUDGMENT

BE IT REMEMBERED that on the 20th day of May, 1991, the above entitled and numbered cause came on for hearing before this Court, and Plaintiff/Relator Harris County appeared by and through its attorney of record, and Intervenor Montgomery County appeared by and through its attorney of record, and Defendants/Respondents The State of Texas; Ann Richards,

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Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice, appeared by and through their attorneys of record.

By an order signed April 25, 1991, this Honorable Court granted partial summary judgment in favor of Plaintiff/Relator Harris County, and Intervenor Montgomery County against Defendants/Respondents, finding and holding that Defendants/Respondents were and are liable to Plaintiff/Relator and Intervenor for the cost of caring for, housing, incarcerating and transporting TDC ready convicted felons both in the past and in the future; and that Defendants/Respondents non-discretionary, mandatory and ministerial duty to house, care for, incarcerate and transport such convicted felons was not and is not in any way relieved or excused or in any way imposed upon any other entity by virtue of House Bill 2335 and/or Article 6166a-4, V.A.C.S., and/or the allocation formula, 37 TAC 152.3, nor were Defendants/Respondents in any way excused from financial liability and responsibility for such convicted felons, nor was such financial liability and responsibility imposed upon any other entity; and that by virtue of its scheduled admissions policy and allocation formula the Defendants/Respondents have enjoyed the use and benefit of ad valorem tax money collected by Harris County and Montgomery County by using such ad valorem tax money to carry out Defendants/Respondents non-discretionary, mandatory and ministerial duties in violation of the Constitution of the State of Texas; and that by doing so Defendants/Respondents have deprived Plaintiff/Relator Harris County and Intervenor Montgomery County of the use of their

ad valorem tax revenues for county purposes; and that Plaintiff/Relator Harris County and Intervenor Montgomery County are entitled to a writ of mandamus ordering the Defendants/Respondents to reimburse and compensate Harris County and Montgomery County for carrying out Defendants/Respondents mandatory, non-discretionary and ministerial duties and responsibilities by housing, caring for, incarcerating and transporting convicted felons both in the past and in the future.

The issue of liability having been determined by the court's summary judgment of April 25, 1991 as aforesaid, on the 20th day of May, 1991, a jury having been previously demanded, and a jury consisting of twelve good and lawful jurors having been duly impaneled, the case proceeded to trial on the issue of damages.

At the conclusion of the evidence, the court submitted the case to the jury on questions. The jury did retire to deliberate its verdict, and returned into open court the following verdict and answers to the following questions.

> "STATE PRISONER" means prisoners sentenced to the state penitentiary.
>
> "PRISONER DAY" means each day or a part of a day that a state prisoner is held in a county jail, but does not include days spent in a county jail by a state prisoner who (1) is returned to county jail on a bench warrant and is awaiting further proceedings; (2) is awaiting trial in state court on the remainder of multiple charges; (3) is awaiting a parole revocation hearing; (4) is being held on federal detainers awaiting trial in federal court;

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and (5) is awaiting a pending appeal of a sentence of ten years or less and who has not exercised his or her right to be transferred to the state penitentiary immediately upon sentencing.

QUESTION NO. 1

For each state prisoner, how many prisoner days after sentencing would be reasonable for the state to accept state prisoners?

In answering this question, you may consider only the following elements and none others.

a. The reasonable amount of time after sentencing that it would take the counties to prepare the paper work required for transfer to the state, if the state were not restricting admissions of state prisoners.

b. The reasonable amount of time that it would take to arrange for transportation of such prisoners to the state, if the state were not restricting admissions of state prisoners.

Answer by indicating the number of days for each county.

Answer:

HARRIS COUNTY	5 days
MONTGOMERY COUNTY	7 days

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QUESTION NO. 2

Between September 28, 1987 and April 30, 1991, how many prisoner days, if any, did the counties hold state prisoners?

Do not include in your answer the time you have found in answer to question number one to be reasonable for the state to accept state prisoners.

Answer by giving the total number of prisoner days, if any, for each county.

Answer:

HARRIS COUNTY	2,310,214 days
MONTGOMERY COUNTY	65,256 days

QUESTION NO. 3

What is the reasonable value per prisoner day, if any, of the services provided by the counties in holding state prisoners?

Answer in dollars and cents, if any, for each county.

Answer:

HARRIS COUNTY	$21.34
MONTGOMERY COUNTY	$17.31

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Thereafter, said verdict was duly received in open court and ordered filed, and the Court being of the opinion that judgment herein should be rendered in accordance with its summary judgment of April 25, 1991 and the aforesaid verdict of the jury, it is the opinion of this court that judgment should be rendered in favor of Plaintiff/Relator Harris County and Intervenor Montgomery County and that a writ of mandamus should be issued to compel Defendants/Respondents to perform their non-discretionary, mandatory and ministerial duty, it is therefore

ORDERED, ADJUDGED and DECREED:

1. That a pre-emptory writ of mandamus issue directing and commanding Defendants/Respondents The State of Texas; Ann Richards, Governor of the State of Texas; Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T. Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice to cause the Texas Department of Criminal Justice to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the Institutional Division of the Texas Department of Criminal Justice or to its predecessor, the Texas Department of Corrections, or to compensate Plaintiff/Relator Harris County at a rate of $21.34 per day and Intervenor Montgomery County at a rate of $17.31 per day for each such prisoner held in Harris County's or Montgomery County's jails and to raise any revenue necessary to pay such compensation.

2. That Defendants/Respondents' duty to provide for the care and custody of prisoners sentenced to the Institutional Division of the Texas Department of Criminal Justice or to its

predecessor, the Texas Department of Corrections, or to pay compensation to Harris County and Montgomery County for holding such prisoners shall begin five calendar days after issuance of judgment sentencing and committing such prisoners to the Texas Department of Criminal Justice, or to its predecessor the Texas Department of Corrections in Harris County, and seven days after issuance of such judgment in Montgomery County.

3. That Defendants/Respondents shall pay to Harris County $49,299,966.76 and to Montgomery County $1,129,581.36 as the aggregate amount of compensation due to Harris County and Montgomery County for the period beginning September 28, 1987 up to and including April 30, 1991 for holding prisoners that were Defendants/Respondents' responsibility under this judgment.

4. That Defendants/Respondents shall pay to Harris County and Montgomery County compensation in accordance with this judgment for prisoners held by each county on or after May 1, 1991 that are the responsibility of Defendants/Respondents. In computing the prisoner days for which compensation is owed from Defendants/Respondents to Harris County and Montgomery County, the county shall exclude days spent in the county jail by a prisoner who (1) is returned to county jail on a bench warrant and is awaiting further proceedings; (2) is awaiting trial in state court on the remainder of multiple charges; (3) is awaiting a parole revocation hearing; (4) is being held on federal detainers awaiting trial in federal court; and (5) is awaiting a pending appeal of a sentence of ten years or less and who has not exercised his or her right to be transferred to the state penitentiary immediately upon sentencing.

5. That Harris County and Montgomery shall submit invoices to Defendants/Respondents for payment of compensation for

prisoners held by the counties on or after May 1, 1991, for which Defendants/Respondents are responsible under this judgment.

6. That Harris County's and Montgomery County's invoices for compensation for the period from and after May 1, 1991 to the date of entry of this judgment shall be presented to Defendants/Respondents by each county by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which this judgment is entered. Thereafter, the counties' invoices for compensation shall be presented by each county to Defendants/Respondents by submitting the invoice to the Director of the Texas Department of Criminal Justice by the last day of the month following the month in which compensation to the county accrues under this judgment.

7. That a constructive trust is hereby imposed on all funds now and hereafter found, deposited and/or on deposit in the State treasury for the purposes of satisfying this judgment and reimbursing Harris County and Montgomery County for housing, caring for, incarcerating and transporting state prisoners both in the past and in the future.

8. That the judgment hereby rendered shall bear post-judgment interest in accordance with Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of 10% from the date of judgment until paid.

9. That the judgment hereby rendered shall bear pre-judgment interest in accordance with Tex.Rev.Civ.Stat.Ann. art. 5069-1.05 (Vernon Supp. 1990) at the rate of 10% from June 6, 1990 through the date the judgment is signed.

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10. That all costs of court be taxed against Defendants/Respondents.

It is further ORDERED that Defendants/Respondents shall not by this judgment be relieved of carrying out their obligations under any other relevant order issued by a court of competent jurisdiction, including the agreed orders Defendants/Respondents have entered into in *Ruiz v. Lynaugh*, No. 78-087-CA; provided, however, that Defendants/Respondents shall not be precluded from seeking modifications to such orders.

SIGNED this 2nd day of August, 1991.

s/ Joseph H. Hart
JOSEPH H. HART
JUDGE, 126TH JUDICIAL
DISTRICT COURT
TRAVIS COUNTY, TEXAS

APPROVED AND ENTRY REQUESTED:

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Appendix G

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APPENDIX H — PEREMPTORY WRIT OF MANDAMUS FILED AUGUST 2, 1991 — *HARRIS COUNTY v. THE STATE OF TEXAS*

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

126TH JUDICIAL DISTRICT

NO. 475,468

HARRIS COUNTY, TEXAS

Plaintiff/Relator

v.

THE STATE OF TEXAS; ANN RICHARDS, GOVERNOR OF THE STATE OF TEXAS; TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JAMES LYNAUGH, DIRECTOR; TEXAS BOARD OF CRIMINAL JUSTICE; CHARLES T. TERRELL; JERRY H. HODGE; F. L. STEPHENS; BEN GALLANT, JR.; JAMES ELLER; MAIME MOORE PROCTOR; ROBERT MANN; AND ALLAN B. POLUNSKY; AS MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE

Defendants/Respondents

PEREMPTORY WRIT OF MANDAMUS

On April 25, 1991, this Court granted partial summary judgment in the above numbered and styled cause finding the Respondents, The State of Texas; Ann Richards, Governor of the State of Texas, Texas Department of Criminal Justice; James Lynaugh, Director; Texas Board of Criminal Justice; Charles T.

Terrell; Jerry H. Hodge; F. L. Stephens; Ben Gallant, Jr.; James Eller; Maime Moore Proctor; Robert Mann; and Allan B. Polunsky; as members of the Texas Board of Criminal Justice have a ministerial, mandatory, nondiscretionary duty to take custody of inmates sentenced by a trial court to the custody of Texas Department of Corrections or its successor agency Texas Department of Criminal Justice.

This Court further found that Respondents had not established legal impossibility or any of the defenses that would preclude issuance of a writ of mandamus and that pursuant to a jury verdict returned May 30, 1991, Respondents have a duty to reimburse the Relator Harris County, Texas and the Intervenor Montgomery County, Texas ("Counties") by paying reasonable compensation in the amount of $21.34 as to Harris County and $17.31 as to Montgomery County per day for the care, treatment, feeding, clothing and management of the inmates that the State should have taken. The compensation should begin to accrue five days in the case of Harris County and accrue seven days in the case of Montgomery County after the date of the judgment and sentence of the court ordering confinement in the Texas Department of Criminal Justice. Respondents have a duty to take all actions necessary to obtain funds required to pay such amounts of compensation.

The Counties have demanded that Respondents perform their duty to take inmates and Respondents have unjustly refused and still refuse to take or make provisions for the inmates.

Respondents show by their acts of refusal to perform the ministerial duty to take the inmates that it is futile for the Counties to issue formal demands for compensation and this Court dispenses with the need for a formal demand and refusal.

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The Respondents' failure to fulfill their duty as outlined above has resulted in manifest injury to the Counties.

Therefore, this Court commands Respondents to provide for the care and custody of all prisoners sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections, or to compensate the Counties at the rate of $21.34 as to Harris County and $17.31 as to Montgomery County per day for each such prisoner held in the Counties' jails after five days from the date of judgment and sentence in the case of Harris County and after seven days from the date of judgment and sentence in the case of Montgomery County.

This Court further commands Respondents to pay to the Counties the aggregate amount of compensation at the rate of $21.34 per day as to Harris County and $17.31 per day as to Montgomery County which has accrued for all periods up to and including April 30, 1991, for holding prisoners that Respondents failed to provide for under Repondents' duty to provide for the care and custody of all persons sentenced by a court of competent jurisdiction to the Texas Department of Criminal Justice or its predecessor the Texas Department of Corrections and to continue paying amounts that become due until such time as Rspondents carry out their duty as outlined above. The aggregate amounts due each County are:

Harris	$49,299,966.76
Montgomery	$1,129,581.36

Further, this Court commands Respondents to take all action necessary to obtain funds to pay reasonable compensation.

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You are hereby further commanded to make return to this writ before this Court on November 4, 1991 at the Travis County Courthouse, stating how you have executed or what you have done in compliance to this writ and have you then and there this writ.

SIGNED this 2nd day of August, 1991.

s/ Joseph H. Hart
JOSEPH H. HART, JUDGE
126th Judicial District Court
Travis County, Texas

APPENDIX I — SUPPLEMENTAL COMPLAINT DATED SEPTEMBER 15, 1989 — *ALBERTI v. JOHNNY KLEVENHAGEN*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-72-1094

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs,

V.

JOHNNY KLEVENHAGEN, ET AL.,

Defendants.

and

WILLIAM P. CLEMENTS; JAMES LYNAUGH; CHARLES T. TERRELL; BEN J. GALLANT, ALLAN BRUCE POLUNSKY; JAMES M. ELLER; F. L. "STEVE" STEPHENS; MAMIE MOORE PROCTOR ROBERT MANN; JERRY H. HODGES; HENRY B. KEENE, RUBEN M. TORRES, CHRIS A. MEALY, WINONA W. MILES, JAMES H. GRANBERRY, WENDELL A. ODOM AND THE STATE OF TEXAS

Rule 19 Defendants.

SUPPLEMENTAL COMPLAINT

LAWRENCE R. ALBERTI, et al., and the class composed

of all persons in the Harris County who are under the custodianship of the Harris County Sheriff, respectfully allege as follows:

I.

ADDITIONAL DEFENDANTS

WILLIAM P. CLEMENTS is the Governor of the State of Texas. He is sued in his official capacity.

JAMES LYNAUGH is the Director of the Texas Department of Corrections. He is sued in his official capacity.

CHARLES T. TERRELL is of the Texas Board of Criminal Justice. He is sued in his official capacity.

BEN GALLANT is a board member on the Texas Board of Criminal Justice. He is sued in his official capacity.

MAMIE MOORE PROCTOR is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

ALLAN BRUCE POLUNSKY is a board member on the Texas Board of Criminal Justice. He is sued in his official capacity.

JAMES M. ELLER is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

F. L. "STEVE" STEPHENS is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

ROBERT MANN is a board member of the Texas Board

of Criminal Justice. He is sued in his official capacity.

JERRY H. HODGES is a board member of the Texas Board of Criminal Justice. He is sued in his official capacity.

HENRY B. KEENE is the Chairman of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

RUBEN M. TORRES is the Vice Chairman of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

CHRIS A. MEALY is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

WINONA W. MILES is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

JAMES H. GRANBERRY is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

WENDELL A. ODOM is a board member of the Texas Board of Pardons and Paroles. He is sued in his official capacity.

THE STATE OF TEXAS is a sovereign state with ultimate responsibility for the care and custody of convicted felons.

II.

JURISDICTION

The Court has continuing jurisdiction over this matter and the County of Defendants by virtue of the Consent Judgment entered in this civil action on February 4, 1975. Additionally the

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Court has jurisdiction over the State of Texas Defendants by virtue of 42 U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343, and the All Writs Act, 28 U.S.C. § 1651.

III.

EVENTS OCCURRING SINCE ENTRY OF THE CONSENT JUDGMENT

On February 4, 1975, Plaintiffs and the County Defendants executed and the Court approved a Consent Judgment, whereby the County Defendants agreed to reduce the overcrowding in the Harris County Jail. Through this consent Judgment and a December 16, 1975, Memorandum and Opinion, *Alberti v. Klevenhagen,* 406 F. Supp. 649 (S.D. Tex. 1975), the Court retained jurisdiction to enter any interim orders necessary to effectuate compliance with the Consent Judgment and has monitored such compliance, entering other remedial orders.

On April 28, 1987, the Court appointed a Special Master and two Monitors ("the Monitors") to oversee the County Defendants' compliance efforts. *Alberti v. Klevenhagen,* 660 F. Supp. 605 (S.D. Tex. 1987). On December 17, 1987, the Court entered an Order which directed the Monitors to assess the overcrowding problem in the Jail. On September 12, 1988, the Monitors filed their Findings of Fact and Recommendations, determining that:

> The Jail is dangerously overcrowded. All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care and mental health

> services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

The Monitors have recommended (Monitors' Recommendations on Population April 11, 1989) that the Court, within 30 days from entry of the order impose a maximum capacity on the Harris County jail is an overall population of 7,000 inmates with no more than 1,000 housed in the Detention Center; within 90 days of the entry of the Courts' Order, reducing the total inmate population to 6,400, with no more than 900 being housed in the Detention Center; within 180 days, of the entry of the Courts' Order, reducing the total population of Harris County facilities to 5,800, with no more than 810 being housed in the Detention Center; within 270 days, reduce the total inmate population of Harris County facilities to 5,200, with no more than 810 being housed in the Detention Center; with completion of the new jail, or in any case no later than June 1, 1991, the defendant must reduce the population of all of their facilities to 100 percent of their design capacity of 8,732 (3,505 for the Jail, 810 for the Detention Center, 417 for the 301 Building; 4,000 for the new jail) by June 1, 1991. Moreover in open Court on September 13, 1989, at a hearing where constitutionality was at issue, the Attorney General of Texas appearing on behalf of the State of Texas judicially conceded that the living conditions at the Harris County Jail including overcrowding are so egregious as to be in violation of the United States Constitution. Likewise on September 12, 1989, in open Court at the same hearing, the County Attorney appearing on behalf of Defendant Klevenhagen conceded that the living conditions at the Harris County Jail including overcrowding are so egregious as to be in violation of the United States Constitution.

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IV.

INVOLVEMENT OF THE STATE DEFENDANTS

Despite its statutory responsibility to accept convicted felons into its facilities, TEX. CODE CRIM. PROC. ANN. art. 42.09; TEX. PENAL CODE §§ 12.32 - 12.34; *Todd v. State*, 598 F.2d 286, 292 (Tex. Crim. App. 1980), the State of Texas by and through its officials has refused to accept its prisoners presently incarcerated in the Harris County Jail.

William Clements, Governor of the State of Texas, is empowered to invoke the Prison Management Act by "certify[ing] that an emergency overcrowding situation exists, and . . . order[ing] the director [of TDC] to credit not more than 90 days of administrative good time to all eligible inmates." TEX. REV. CIV. STAT. ANN. art. 61840. He has, however, taken no steps to invoke the Act and alleviate TDC's overcrowding, which in turn would reduce the numbers held in the Harris County Jail.

James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, of the Texas Board of Criminal Justice; Ben J. Gallant; Allan Bruce Polunsky, James M. Eller, F. L. "Steve" Stephens, Mamie Moore Proctor, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Criminal Justice, are vested with the exclusive management and control of TDC. TEX. REV. CIV. STAT. ANN. art. 6166q. Furthermore, these individuals, acting in their official capacities, are responsible for "mak[ing] suitable provisions and regulations for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services . . ." TEX. REV. CIV. STAT. ANN. art. 6166r.

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Henry B. Keene, Chairman of the Texas Board of Pardons and Paroles, Ruben M. Torres, Chris A. Mealy, Winona W. Miles, James H. Granberry, Wendell A. Odom, Board Members on the Texas Board of Pardons and Paroles are vested with the exclusive authority to administer the provisions of the Adult Probation, Parole, and Mandatory Supervision Law, Tex. Crim. Proc. Ann. art. 42.12 and to determine which prisoners shall be paroled from TDC, the conditions of their parole and mandatory supervision including the degree and intensity of supervision a prisoner released on parole or released to mandatory supervision should receive.

Although a substantial number of persons currently incarcerated in the Harris County Jail are convicted felons who are eligible for parole, their paroles are being delayed because of the lack of prompt processing by the Texas Board of Pardons and Paroles.

Convicted felony jail inmates are denied the same consideration for good time and trustee time as inmates transferred to the penitentiary (Institutional Division). Inmates in jail are not given credit for good time presented through the Prison Management Act. Jail inmates who are jail trustees are not awarded additional trustee time credits that they would earn if they had been transferred to the penitentiary. Awarding good time and trustee time based upon whether a person is sent by the Sheriff to the penitentiary (Institutional Division) is an unreasonable classification and constitutes a violation of the equal protection clause of the fourteenth amendment.

V.

CONSTITUTIONAL BASIS

The foregoing actions by the Rule 19 defendants have cause

plaintiffs to suffer deprivations of the rights secure by the fourteenth amendment (due process and equal protection) and the eighth amendment (cruel and unusual punishment) and their participation is necessary to achieve complete relief.

WHEREFORE, Plaintiffs pray that the above-named State officials be cited to appear and that upon final hearing of this matter, the Court entered such Orders as are appropriate to eliminate the unconstitutional conditions that exist at the Harris County Jail facilities and to effectuate full compliane with the Consent Judgment entered by this Court on February 4, 1975.

Plaintiffs further pray for such other and further relief, including reasonable attorneys fees and costs, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

s/ James T. Oitzinger
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CO-COUNSEL FOR PLAINTIFF

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(713) 981-9595

CO-COUNSEL FOR PLAINTIFF

Appendix I

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 1989, a true and correct copy of the foregoing Plaintiffs' Supplemental Complaint was served upon the following counsel of record by Hand Delivery in the courtroom of Judge James DeAnda:

Mr. Harold Streicher
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Mr. Roderick Lawrence
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Ms. Lisa Rice
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002

Mr. Robert Ozer
Assistant Attorney General
Supreme Court Building
P.O. Box 12548
Capitol Station
Austin, Texas 78711

s/ James T. Oitzinger
JAMES T. OITZINGER

APPENDIX J — THIRD PARTY COMPLAINT FILED JANUARY 13, 1989 — *ALBERTI v. SHERIFF OF HARRIS COUNTY (WITHOUT EXHIBITS)*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CIVIL ACTION NO. 72-H-1094

LAWRENCE R. ALBERTI, ET AL.,

Plaintiffs

vs.

THE SHERIFF OF HARRIS COUNTY, ET AL.,

vs.

WILLIAM P. CLEMENTS; JAMES LYNAUGH; CHARLES T. TERRELL; DERALYN R. DAVIS; JOSEPH V. LAMANTIA; ALLAN BRUCE POLUNSKY; JAMES M. ELLER; F.L. "STEVE" STEPHENS, DENNIS R. HENDRIX; ROBERT MANN; JERRY H. HODGES (each in his or her official capacity).

THIRD PARTY COMPLAINT

THE SHERIFF OF HARRIS COUNTY, TEXAS, and HARRIS COUNTY, TEXAS, by and through its COMMISSIONERS COURT, DEFENDANTS and THIRD PARTY PLAINTIFFS herein, complaining of William P. Clements, Governor of the State of Texas; James Lynaugh,

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Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, each in his or her official capacity, respectfully allege as follows:

I. Parties

1. Johnny Klevenhagen is the SHERIFF OF HARRIS COUNTY, TEXAS, and a defendant in the underlying action filed pursuant to 42 U.S.C.A. § 1983 (West 1981).

2. HARRIS COUNTY, TEXAS, a political subdivision of the State, Jon Lindsay, the HARRIS COUNTY JUDGE, and Harris County Commissioners E.A. Lyons, Jim Fonteno, El Franco Lee and Steve Radack, all of whom are members of the HARRIS COUNTY COMMISSIONERS COURT, which is the governing body of Harris County, Texas, are defendants in the underlying action filed pursuant to 42 U.S.C.A § 1983 (West 1981).

3. WILLIAM P. CLEMENTS is the Governor of the State of Texas, and may be served by mail at P.O. Box 12428, State Capitol, Austin, Texas 78711.

4. JAMES LYNAUGH is the Director of the Texas Department of Corrections and may be served by mail at P.O. Box 99, Huntsville, Texas 77340.

5. CHARLES T. TERRELL is the Chairman of the Texas Board of Corrections and may be served by mail at P.O. Box 35948, Dallas, Texas 75235.

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6. DERALYN R. DAVIS is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 15126, Fort Worth, Texas 76110.

7. JOSEPH V. LAMANTIA is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 1003, Weslaco, Texas 78596.

8. ALLAN BRUCE POLUNSKY is a board member on the Texas Board of Corrections and may be served by mail at 1 Forum 16th Floor, 8000 Interstate Highway 10 West, San Antonio, Texas 78230.

9. JAMES M. ELLER is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box GJ, College Station, Texas 77841.

10. F.L. "STEVE" STEPHENS is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 5581, San Angelo, Texas 76902.

11. DENNIS R. HENDRIX is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 2521, Houston, Texas 77252.

12. ROBERT MANN is a board member on the Texas Board of Corrections and may be served by mail at P.O. Box 8436, Waco, Texas 76714.

13. JERRY H. HODGES is a board member on the Texas Board of Corrections and may be served by mail at 25 Medical Drive, Amarillo, Texas 79106.

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II. JURISDICTION

14. The Court has jurisdiction pursuant to 42 U.S.C.A. § 1343(3) (West Supp. 1988).

15. Additionally, the Court has pendent jurisdiction of the claims against the Third Party Defendants in that the Third Party Complaint arises out of the matters alleged in the Original Complaint filed in this cause.

III. CAUSE OF ACTION

16. On August 14, 1972, Plaintiffs filed a Complaint against Defendants, contending, *inter alia*, that the overcrowded conditions existing in the Harris County Jail violated their constitutional rights. *See* Exhibit A. On February 4, 1975, the parties executed and the Court approved a Consent Judgment, whereby Defendants agreed to reduce the overcrowding in the Harris County Jail. *See* Exhibit B. Through this Consent Judgment and a December 16, 1975, Memorandum and Opinion, *Alberti v. Kelvenhagen*, 406 F. Supp. 649 (S.D. Tex. 1975), the Court retained jurisdiction to enter any interim orders necessary to effectuate compliance with the Consent Judgment and has monitored such compliance, entering other remedial orders. *See* Exhibit B at 5.

17. On April 28, 1987, the Court appointed a Special Master and two Monitors ("the Monitors") to oversee the Defendants' compliance efforts. *Alberti v. Klevenhagen*, 660 F. Supp. 605 (S.D Tex. 1987). On December 17, 1987, the Court entered an Order which directed the Monitors to assess the overcrowding problem in the Jail. On September 12, 1988, the Monitors filed their Findings of Fact and Recommendations, determining that:

> The Jail is dangerously overcrowded. All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care and mental health services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

See Exhibit C at 26. The Monitors stressed that the State of Texas, not the Defendants, caused and was responsible for the current overcrowding dilemma:

> It should be re-emphasized in the strongest of terms that Harris County has addressed its responsibilities fully and well. The culprit here is the State of Texas which has failed to provide adequate constitutional housing for its offender population and has gotten away so far with simply exporting the results of its failure to the counties. The anomalous result is that while the State is subject to a 95 percent cap by one federal district court, one of its subdivisions is being pushed to demand permission of another federal district court to overpopulate its facilities limitlessly.

See Exhibit C at 28 (emphasis added). The Monitors recommended that the Court impose a ceiling capacity on the Harris County Jail, reducing its overall population to 120 percent of total design capacity within 60 days of the entry of the Court's Order; to 110 percent of total design capacity by the time the 301 San Jacinto

Jail's renovation has been completed; and to 95 percent of total design capacity by June 1, 1991. *See* Exhibit C at 29.

18. On November 8, 1988, the Court entered an Order requiring the SHERIFF to transport and deliver to the Texas Department of Corrections ("TDC") at least 290 "convicted felons ready for transfer to TDC" per week each week beginning December 5, 1988, finding that:

> [D]angerously overcrowded conditions exist in the Harris County correctional facilities [that] have been exascerbated substantially, if not caused primarily or solely, by the failure of TDC to receive convicted felons ready for transfer to the TDC in sufficient numbers and in a sufficiently timely manner to alleviate the overcrowded and dangerous conditions which exist within Harris County correctional facilities. The Court also finds that such circumstances have interfered substantially with the defendants' efforts to achieve compliance with the terms and mandates of the original consent decree and subsequent orders in this case. The court further finds that because of the severe overcrowding conditions presently existing in the Harris County detention facilities, the Sheriff should not be housing convicted felons ready for transfer to the TDC in Harris County correctional facilities for any period of time longer than minimally and reasonably required to complete the paperwork relating to such persons and effectuate their transportation and delivery to TDC.

See Exhibit D at 4 - 5, 6.

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19. Despite its statutory responsibility to accept convicted felons into its facilities, TEX. CODE CRIM. PROC. ANN. art. 42.09 (West Supp. 1988); TEX. PENAL CODE §§ 12.32 - 12.34 (West 1974 & Supp. 1988); *Todd v. State*, 598 F.2d 286, 292 (Tex. Crim. App. 1980), and contrary to the Court's remedial Order concerning Plaintiffs' adjudicated constitutional rights, the State, by and through its officials, has refused to accept its prisoners, stating that "the Texas Department of Corrections will not accept prisoners from Harris County, or any other county of the State of Texas, above the number allocated pursuant to the scheduled admissions policy." *See* Exhibit E.

20. Given this refusal, and without statutory authority to simply release TDC ready felons, *see* TEX. CODE CRIM. PROC. ANN. 42.09 (West Supp. 1988), the SHERIFF and HARRIS COUNTY cannot achieve compliance with the Court's November 8, 1988, Order and protect PLAINTIFFS' adjudicated rights without joining THIRD PARTY DEFENDANTS and securing injunctive relief against them. On December 12, 1988, the Sheriff reported his inability to achieve compliance with the Court's Orders. *See* Exhibit F.

21. William P. Clements, Governor of the State of Texas; James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James Eller, F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, are liable to THIRD PARTY PLAINTIFFS for THIRD PARTY PLAINTIFFS' inability to comply with the Court's November 8, 1988 Order, which found that dangerously overcrowded conditions exist in the Harris County Jail. *See* Exhibit D at 4 -5.

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22. William Clements, Governor of the State of Texas, is empowered to invoke the Prison Management Act by "certify[ing] that an emergency overcrowding situation exists, and . . . order[ing] the director [of TDC] to credit not more than 90 days of administrative good time to all eligible inmates." TEX. REV. CIV. STAT. ANN. art. 6184o (West Supp. 1988). He has, however, taken no steps to invoke the Act and alleviate TDC's overcrowding, which in turn would reduce the numbers held in the Harris County Jail.

23. James Lynaugh, Director of the Texas Department of Corrections; Charles T. Terrell, Chairman of the Texas Board of Corrections; Deralyn R. Davis, Joseph V. Lamantia, Allan Bruce Polunsky, James M. Eller, F.L. "Steve" Stephens, Dennis R. Hendrix, Robert Mann and Jerry H. Hodges, Board Members on the Texas Board of Corrections, are vested with the exclusive management and control of TDC. TEX. REV. CIV. STAT. ANN. art. 6166g (West 1970). Furthermore, these individuals, acting in their official capacities, are responsible for "mak[ing] suitable provision and regulations for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services. . ." TEX. REV. CIV. STAT. ANN. art. 6166r (West 1970). Notwithstanding the fact that the Sheriff has demonstrated his willingness to perform such services, *see* Exhibit F, THIRD PARTY DEFENDANTS have failed to make such provisions and regulations, and in fact have established a transfer system which balances their population by forcing the Harris County Jail to become a state penitentiary.

24. By reason of the THIRD PARTY DEFENDANTS' failure to accept their prisoners as required by state law, the THIRD PARTY DEFENDANTS are liable to the THIRD PARTY

PLAINTIFFS, who cannot achieve compliance with the Court's Orders and protect PLAINTIFFS' adjudicated constitutional rights. The THIRD PARTY PLAINTIFFS have no adequate remedy at law and will suffer irreparable injury if the relief requested is not granted.

IV. RELIEF

WHEREFORE, premises considered, THIRD PARTY PLAINTIFFS demand judgment against the THIRD PARTY DEFENDANTS, each in his or her official capacity, and their agents, employees and those acting in active concert with them, ordering them to immediately remove from the Harris County Jail, all persons who are currently "convicted felons ready for transfer to TDC", as defined in the Court's November 8, 1988 Order, and to continue thereafter to remove from the Harris county Jail all persons who become "convicted felons ready for transfer to TDC." *See* Exhibit D at 5 - 6. THIRD PARTY PLAINTIFFS further seek such other and further relief to which they may show themselves entitled under both law and equity.

Respectfully submitted,

s/ Harold M. Streicher
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ATTORNEY FOR DEFENDANT
SHERIFF OF HARRIS COUNTY

Appendix J

s/ Roderick Q. Lawrence
RODERICK Q. LAWRENCE
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ATTORNEY FOR DEFENDANT
HARRIS COUNTY
COMMISSIONERS COURT

OF COUNSEL:

MIKE DRISCOLL
County Attorney
Harris County, Texas

APPENDIX K — ORDER FILED OCTOBER 10, 1990 — IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90-2810

IN RE: WILLIAM P. CLEMENTS, JR., ET AL.,

Petitioners.

On Petition for Writ of Mandamus

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

BY THE COURT:

It appearing that all counsel now agree that the stay entered by this court on September 21, 1990 is no longer necessary, it is hereby VACATED, without prejudice.

Our decision to vacate the stay is premised on two points. First, we understand that the district court will not authorize release of felony offenders without sufficient notice for application by any party for further stay by this court.

Second, we understand that the parties are working to obtain a process that will protect the public safety and the integrity of the criminal justice system as well as the rights of prisoners. In this regard, it is significant that the state of Texas sees the *Ruiz* decree as a potential impediment to the flow of state prisoners from county facilities to its custody. We repeat: such superintending injunctions must (1) be tailored to the found wrong; and (2) impose limits upon state institutions no greater than is necessary to remedy found deprivations of constitutional rights; and (3) be modified to reflect changing conditions, including any

change in threats to the public safety as well as changes in the prison conditions that supported the extant decree. *See Ruiz v. Lynaugh,* 811 F.2d 856 (5th Cir. 1987) (Hill, J., specially concurring).

APPENDIX L — ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN *ALBERTI*

Texas Constitutional Provisions

Tex. Const. art. VIII, § 1-a (Vernon 1984):

> The several counties of the State are authorized to levy ad valorem taxes upon all property within their respective boundries for county purposes . . .

1. Tex. Penal Code Ann. § 12.31(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by confinement in the Institutional Division of the Texas Department of Criminal Justice for life or by death. An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by confinement in the institutional division for life.

2. Tex. Penal Code Ann. § 12.32(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a felony of the first degree shall be punished by confinement in the Texas Department of Corrections for life or for any term of not more than 99 years or less than 5 years.

3. Tex. Penal Code Ann. § 12.33(a) (Vernon 1974)

> An individual adjudged guilty of a felony of the second degree shall be punished by confinement

in the Texas Department of Corrections for any term of not more than 20 years or less than 2 years.

4. Tex. Penal Code Ann. § 12.34(a) (Vernon Supp. 1992)

> An individual adjudged guilty of a felony of the third degree shall be punished by: (1) confinement in the institutional division of the Texas Department of Criminal Justice for any term of not more than 10 years or less than 2 years; (2) confinement in a community correctional facility for any term of not more than 1 year.

5. Tex. Penal Code Ann. § 12.42 (Vernon 1974 & Supp. 1992)

> (a) If it be shown on the trial of a third-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a second-degree felony.
>
> (b) If it be shown on the trial of a second-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished for a first-degree felony.
>
> (c) If it be shown on the trial of a first-degree felony that the defendant has been once before convicted of any felony, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 15 years . . .
>
> (d) If it be shown on the trial of any felony offense

that the defendant has been once before convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 25 years.

6. Tex. Crim. Proc. Code Ann. art. 42.09 §§ 1-4 (Vernon Supp. 1992)

§ 1. Except as provided in Sections 2 and 3, a defendant shall be delivered to jail or to the Department of Corrections when his sentence to imprisonment is announced, or his sentence to death is announced by the court . . .

§ 2. If a defendant appeals his conviction and is released on bail pending disposition of his appeal, when his conviction is affirmed, the clerk of the trial court on receipt of the mandate from the appellate court, shall issue a commitment against the defendant. The officer executing the commitment shall endorse thereon the date he takes the defendant into custody and the defendant's sentence begins to run from the date endorsed on the commitment. The Department of Corrections shall admit the defendant named in the commitment on the basis of the commitment.

§ 3. If a defendant is convicted of a felony and sentenced to death, life, or a term of more than ten years in the Department of Corrections and

> he gives notice of appeal, he shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals.
>
> § 4. If a defendant is convicted of a felony and his sentence is a term of ten years or less and he gives notice of appeal, he shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals upon request in open court or upon written request to the sentencing court. Upon a valid transfer to the Department of Corrections under this section, the defendant may not thereafter be released on bail pending his appeal.

7. Tex. Rev. Civ. Stat. Ann. art. 6166r (in effect from 1927 — August 31, 1989) (recodified at Tex. Gov. Code Ann. § 499.006 (Vernon 1990) (deleting "speedy") and recodified later at Tex. Gov. Code Ann. § 500.006 (Vernon Supp. 1992))

> The [Director of the Texas Department of Corrections] shall make suitable provision and regulation for the safe and speedy transportation of prisoners from counties where sentenced to the State penitentiary by the sheriffs of such respective counties if such sheriffs are willing to perform such services as cheaply as said commission can have it done otherwise. Said transportation shall be on State account . . .

8. Tex. Gov't Code Ann. § 493.001 (Vernon Supp. 1992)

Appendix L

(formerly Tex. Rev. Civ. Stat. Ann. art. 4413(401) § 1.02(a))

> The [Texas Department of Criminal Justice] is the State agency with primary responsibility for: (1) the confinement, supervision, and rehabilitation of felons; (2) the development of a system of state and local punishment, supervision, and rehabilitation programs and facilities; and (3) the reintegration of felons into society after release from confinement.

9. Tex. Gov't Code Ann. § 495.001(a) (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.001(a) (Vernon 1990))

> The board [of Criminal Justice] may contract with a private vendor or with the commissioners court of a county for the financing, construction, operation, maintenance, or management of a secure correctional facility.

10. Tex. Gov't Code Ann. § 495.004 (Vernon Supp. 1992) (formerly Tex. Gov't Code Ann. § 494.004 (Vernon 1990))

> A private vendor or county operating under a contract authorized by this subchapter may not: (1) compute inmate release and parole eligibility dates; (2) award good conduct time; (3) approve an inmate for work, medical, or temporary furlough or for preparole transfer; or (4) classify an inmate or place an inmate in less restrictive custody than the custody ordered by the institutional division.